(9)

No. 94-1474

In The

Supreme Court of the United States

October Term, 1995

IDAHO, et al.,

Petitioners,

v.

COEUR D'ALENE TRIBE OF IDAHO, et al.,

Respondents.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

BRIEF FOR RESPONDENTS

RAYMOND C. GIVENS*
SHANNON D. WORK
GIVENS, FUNKE & WORK
424 Sherman Avenue
Suite 308
Coeur d'Alene, Idaho
83814
(208) 667-5486

Attorneys for Respondents

*Counsel of Record

DAVID J. BEDERMAN
PHILIP J. BAUER
Gambrell Hall
Atlanta, Georgia 30322

Of Counsel

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

112 pp

QUESTIONS PRESENTED

1. The Eleventh Amendment bars federal courts from hearing quiet title actions brought by Indian tribes against a state to adjudicate title to, and gain possession of, waters and submerged lands held by the state under the equal footing doctrine of the United States Constitution. The issue presented by this case is whether a federal court may nonetheless hear an action against state officers for injunctive and declaratory relief when such relief requires adjudication of the state's equal footing title and will deprive the state of all practical benefits of ownership of the disputed waters and submerged lands.

2. The President, absent an express delegation of Congress' exclusive authority over public lands, cannot convey title of uplands to Indian tribes. *Sioux Tribe of Indians v. United States*, 316 U.S. 317 (1942). The issue presented in this case is whether the President, acting without express congressional authority, can nonetheless convey title of the beds and banks of navigable waters to an Indian tribe, thereby defeating a state's entitlement to such lands under the equal footing doctrine of the United States Constitution.

TABLE OF CONTENTS

TABLE OF CONTINUED

TABLE OF AUTHORITIES

Page

FEDERAL CASES

TABLE OF AUTHORITIES – Continued

Page

TABLE OF AUTHORITIES – Continued

STATE CASES

TABLE OF AUTHORITIES – Continued

FEDERAL STATUTES

STATE STATUTES

TABLE OF AUTHORITIES – Continued

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The United States Constitution provides:

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding. U.S. Const. art. VI, cl. 2.

All other constitutional and statutory provisions are contained either in Petitioner's Brief or the Appendix to this brief.

STATEMENT OF THE CASE

This case originated as a boundary dispute between two sovereigns – a sovereign Indian tribe, the Coeur d'Alene Tribe and its officials (hereafter Tribe or tribal officials), and a sovereign state – the state of Idaho, its departments and officials (hereafter Idaho or Idaho officers). The Complaint sought: (1) the ownership of the beds and banks of various navigable watercourses (Lake Coeur d'Alene and portions of the Coeur d'Alene, St. Joe and Spokane rivers);[1] and (2) the right or jurisdiction to regulate and use those waters. It is similar to disputes

[1] The State officers have referred to the beds and banks of the navigable watercourses as "submerged lands." The Tribe will use the same term.

this Court often hears between two states regarding ownership of a river which forms their boundary.

There are two recurring themes which seem to impact every aspect of this case. The first is that the dispute is now between a sovereign and the officers of another sovereign. It is not a dispute between a citizen and sovereign. The second theme is the premature procedural posture of this case. The action is only at the Fed.R.Civ.P. 12(b) Motion to Dismiss stage. The only record is the Complaint and the Motion to Dismiss.[2] Brief in Opposition to Petition for Writ (Br. in Opp.) App. 3, 15.

The district court dismissed Idaho and the Idaho departments completely and dismissed the Idaho officers as to declaratory judgment and quiet title claims on Eleventh Amendment grounds. Pet. App. at 32-40. The district court found that it would have jurisdiction to enjoin the Idaho officers if they were violating federal law under *Ex Parte Young*, 209 U.S. 123 (1908). Pet. App. at 40.

The district court then proceeded most unusually. It went to the merits of the case in a Fed.R.Civ.P. 12(b) motion. Without any factual record, the district court ruled that the Tribe and tribal officials had not overcome the "strong presumption" of *Montana v. United States*, 450 U.S. 544 (1981). Pet. App. at 46-47. The case was dismissed. Pet. App. at 49.

---

[2] "On a motion to dismiss we presume that general allegations embrace those specific facts that are necessary to support the claim." *Lewis v. Casey*, No. 94-1511, 1996 WL 340797 (1996).

The court of appeals affirmed in part and reversed in part. The court of appeals affirmed as to the dismissal of Idaho and the Idaho departments.[3]

The court of appeals reversed as to the Idaho officers. First it carefully limited the relief that could be available. The court of appeals held that if the trial court found the property belonged to the Tribe, it could enjoin Idaho officers from violating any rights of the Tribe. It could also declare the Tribe to be the owner "against all claimants except the State of Idaho and its agencies." Pet. App. at 22. It then rejected Idaho's argument on the merits and remanded the case for trial, stating: "As it is conceivable that the Tribe could prove facts that would entitle it to the relief sought [against the state officers only], dismissal for failure to state a claim was error." Pet. App. 27.

The court of appeals also remanded for trial the aboriginal title count of the Complaint which it found that the trial court had improperly dismissed without discussion. Pet. App. at 28.

---

[3] The court of appeals rejected the Tribe's argument: (1) that a state can define its own sovereignty any way it wishes, (2) that Idaho had defined its sovereignty in a limited way as a result of Idaho Supreme Court holdings that actions to quiet title were actions against the property not against the sovereignty of the state, and (3) that consequently the Eleventh Amendment was no bar to such an action against Idaho because the Eleventh Amendment protects a state's sovereignty and this suit was not against the states' sovereignty. The Tribe cross-petitioned for certiorari on this issue, but that cross-petition was denied. *Roddy v. State*, 139 P.2d 1005 (*Id.* 1943); *Lyon v. State*, 283 P.2d 1105 (*Id.* 1995) Pet. App. 7-8.

The action against Idaho and its departments is over, although the Complaint still contains those allegations. What remains of the suit is declaratory and injunctive relief against Idaho officers to stop their violation of federal law (acting in violation of the Tribe's federal rights of ownership) and to quiet the Tribe's title against the world other than Idaho and its departments. Pet. App. 5-7.

Normally a Statement of the Case would contain a recital of the applicable facts. But here there is no factual record, only a Complaint and briefs regarding the Motion to Dismiss.

There is, however, the opportunity to view the Federal Energy Regulatory Commission's (F.E.R.C.) treatment of the facts on the underlying issue. In 1973 the Tribe intervened in a F.E.R.C. licensing proceeding to seek compensation for a utility's water storage on Lake Coeur d'Alene. Following a hearing, the F.E.R.C. in 1983 ruled that the Tribe owned the beds and banks of the southern portion of Lake Coeur d'Alene. 1983 WL 37712 (F.E.R.C.). Later, in 1988 the F.E.R.C. ruled that it did not have jurisdiction to make such an ownership determination. 1988 WL 244511 (F.E.R.C.).

The F.E.R.C. determination of tribal ownership is not determinative in any way. It is not part of the record of this case. But it is illustrative of *some* of the underlying facts just as the factual discussion regarding the Crow Tribe's interest in the Big Horn River in *United States v. Finch*, 548 F.2d 822 (reversed on other grounds) was considered in *Montana v. United States*, 544, 554-555. The F.E.R.C. is the only impartial decision-maker to consider

the merits of this case and view the evidence there presented in relation to the law. It is simply appropriate to inform the Court of this case in which the Tribe prevailed until the jurisdictional determination.

Finally, it is appropriate to note that the United States, as the Tribe's trustee, has filed suit against Idaho regarding ownership of a portion of Lake Coeur d'Alene and a portion of the St. Joe River. The issues and area at issue in that action are less than the Tribe's suit which covers almost all of Lake Coeur d'Alene and portions of the Coeur d'Alene and Spokane rivers. The Tribe has been granted intervention status, but the scope of the Tribe's Complaint in Intervention is limited to the area at issue in the United States' suit. *U.S. and Coeur d'Alene Tribe v. Idaho*, U.S. Dist. Ct. #CIV-94-0328-N-EJL, November 9, 1995 Order.

SUMMARY OF ARGUMENT

The Eleventh Amendment caselaw developed during the past century by this Court serves a critical purpose in this nation's Constitutional government. The thoughtfully crafted approach embodied in *Ex Parte Young*, 209 U.S. 123 (1908), and its progeny honors the sovereignty of our states through its narrowly tailored exception to immunity from suit. At the same time the doctrine gives life to the Supremacy Clause. Disputes periodically arise between states and others, and when they involve the infringement of federally protected rights by state officials, the *Ex Parte Young* doctrine opens the federal court doors for their resolution.

The Ninth Circuit Court of Appeals correctly determined that the Coeur d'Alene Tribe's claim seeking to prevent Idaho's officers from acting contrary to its federally recognized ownership rights in Lake Coeur d'Alene is maintainable under the *Ex Parte Young* doctrine. This Court in 1897 held real property cases against state officers were not barred by the Eleventh Amendment, *Tindal v. Wesley*, 167 U.S. 205 (1897), and last decade held personal property cases also were not prohibited by Eleventh Amendment immunity. *Florida Dep't of State v. Treasure Salvors, Inc.*, 458 U.S. 670 (1982). After examining the breadth of caselaw in this area, the *Treasure Salvors* decision identified a three part analysis for ascertaining the viability of claims like the Coeur d'Alene Tribe's. The Ninth Circuit Court of Appeals carefully applied these principles to determine whether the Tribe's claim met the standards of each part: the state officers are the real party in interest, their alleged conduct interferes with the Tribe's properly alleged federal rights, and the Tribe seeks permissible prospective relief.

The Tribe's possessory claim is grounded in the long history of this nation's dealings with Indian tribes and in over 130 years of specific dealings between the Coeur d'Alene Tribe and the United States. Held by the Tribe from time immemorial, Lake Coeur d'Alene was included within the boundaries of its reservation created in 1873 by Executive Order. The power to do so was vested in the President by virtue of Congress' long acquiescence in the practice. *United States v. Midwest Oil Co.*, 236 U.S. 459 (1915). The effect of that reservation and its inclusion of the lake can only be decided following the factual inquiry required by *Montana v. United States*, 450 U.S. 544 (1981).

All other cases issued by this Court in connection with ownership of lands beneath navigable waterways similarly require factual inquiry. While *Montana* recognized a presumption exists that states own such lands, the presumption is rebuttable by a showing of the Tribe's and United States' intent and understanding. Numerous pre-statehood and post-statehood actions taken by Congress regarding Lake Coeur d'Alene would demonstrate the Tribe's ownership but for the current procedural posture of this case. When viewed in the light of applicable presumptions and rules of interpretation, the facts which the Tribe is entitled to present at trial will prove its claim for the requested relief.

I. THE ELEVENTH AMENDMENT DOES NOT BAR STATE OFFICERS FROM BEING SUED IN FEDERAL COURT FOR DECLARATORY AND INJUNCTIVE RELIEF TO HALT A VIOLATION OF FEDERAL LAW.

A. Federal Courts Have Jurisdiction to Enjoin State Officers From Continuing in Possession of Property if Federal Law Entitles Another to Possession.

It has long been held that federal courts have jurisdiction to enjoin state officers from violating federal law. *Ex Parte Young*, 209 U.S. 123 (1908). It has even longer been held that federal courts have jurisdiction to enjoin state officers from continuing in possession of property if federal law entitles another to possession. *Tindal v. Wesley*, 167 U.S. 204 (1897).

In the first Question Presented, the Idaho officers ask this Court to limit these rules as they relate to property,

or at least to property under navigable waters. The Eleventh Amendment Question Presented implicates the usual Eleventh Amendment conflicting concerns of federal supremacy versus state sovereignty. But it does more. It implicates the third concern of Indian tribal sovereignty and the plenary federal authority over Indian affairs that is constitutionally based. *Morton v. Mancari*, 417 U.S. 535, 551-552 (1974) *citing* U.S. Const. art. I, § 8, cl. 3.

Questions involving violations of federal law by *state* officers should be resolved in federal courts. This Court's existing case law does not bar such federal court jurisdiction – an action against state officers involving property. Indeed, *Ex Parte Young* and *Tindal* hold the opposite, and there is no basis for changing this long standing rule which is so essential to preserving the supremacy of federal law.

By its express terms, the Eleventh Amendment bars a federal court lawsuit by a citizen of one state against another state. U.S. Const. amend. XI. Nearly 100 years ago, Mr. Wesley, a citizen of New York, filed in South Carolina federal court against Mr. Tindal, the Secretary of State of South Carolina, for possession of certain real property in which the state claimed an interest. *Tindal v. Wesley*, 167 U.S. 204 (1897). The case fell squarely within the black letter of the Eleventh Amendment. The state officers defended on Eleventh Amendment grounds, specifically on the theory that a suit against the officer for possession was really a suit against the state for title and that deciding the case would preclude the state in future litigation. *Id.*

This Court forcefully rejected those arguments, which are identical to arguments made by the Idaho officers in this case. *Id.* at 221, Pet. Br. at 12-26. The *Tindal* court held the suit was not against the state, and granted prospective injunctive relief. *Tindal*, 167 U.S. at 223.

A few years before *Tindal* this Court had issued *Hans v. Louisiana*, 134 U.S. 1 (1890), which began the expansive sweep of the Eleventh Amendment far beyond its actual words to provide states broad immunity from suits in federal court. The basis of this expanded immunity from suit in federal court was the state's sovereignty. *Seminole Tribe of Florida v. Florida*, 116 S.Ct. 1114, 1122 (1996) *citing Hans v. Louisiana*, 134 U.S. 1 (1890). But the Court soon saw the threat that this broad new immunity posed to the supremacy of federal law. Seeking a way to balance the Constitutional requirement of supremacy of federal law with this respect for state sovereignty, the Court turned to the officer suit approach of *Tindal* and other cases.

In *Ex Parte Young*, 209 U.S. 123 (1908), the Court held that the Eleventh Amendment did not bar a state officer being sued in federal court for injunctive relief to halt a violation of federal law. The federal question addressed by that Court was "whether the acts of the legislature and the orders of the railroad commission, if enforced, would take property without due process of law. . . . " *Id.* at 144. The rationale was that where a state officer was acting in violation of federal law he was "stripped" of his official status and was acting as a private individual. *Id.* at 159.

A workable balance was thus found which respected state sovereignty and ensured the supremacy of federal law. The *Ex Parte Young* officer suit doctrine has been

much refined over the years, but its balanced maintenance of federal supremacy has stood the test of time. *Pennhurst State School & Hosp. v. Halderman*, 465 U.S. 89, 105 (1984) (" . . . the *Young* doctrine has been accepted as necessary to permit the federal courts to vindicate federal rights and hold state officials responsible to 'the supreme authority of the United States.' ") (*quoting Ex Parte Young*); *Florida Dep't of State v. Treasure Salvors, Inc.*, 458 U.S. 670, 697 (1982) ("If the Constitution provided no protection against such unbridled [state officer] authority, all property rights would exist only at the whim of the sovereign [state]."); *Green v. Mansour*, 474 U.S. 64, 68 (1985) ("[T]he availability of prospective relief of the sort awarded in *Ex Parte Young* gives life to the Supremacy Clause."). *Ex Parte Young*'s viability was most recently reaffirmed in *Seminole Tribe*, although the doctrine was found to be inapplicable because of the unique statutory scheme in that case. *Seminole Tribe of Florida v. Florida*, 116 S.Ct. at 1114, n.14.

Another line of officer suits regarding property has developed regarding *federal* officers. *United States v. Lee*, 106 U.S. 196 (1882). *See also Block v. North Dakota*, 461 U.S. 273 (1983); *Malone v. Bowdoin*, 369 U.S. 643 (1969); *Larson v. Domestic and Foreign Commerce Corp.*, 337 U.S. 682 (1949). The thrust of these *federal* officer suit cases is that the suit is maintainable if the *federal* officer is alleged to be violating the constitution or exceeding his federal statutory authority. *See Larson*, 337 U.S. at 690; *Malone*, 369 U.S. at 647. But, if there is an adequate federal remedy, such as the Quiet Title Act in *Block*, then the suit against the officer cannot be maintained because of federal sovereign immunity. *See Block*, 461 U.S. at 277.

The Idaho officers imply that state officer suits regarding property are cut from the same cloth as federal officer suits regarding property. Pet. Br. 11-12, n.3. But they are not. The two rest on vastly different jurisprudential foundations.

Federal officer suits regarding property are based upon the need to provide a remedy to enforce the Fifth Amendment's protection of property.[4] *See Larson*, 337 U.S. at 690. The *federal* officer suit was the vehicle used to balance federal sovereign immunity against the individual's need for a remedy to enforce the constitutional property protections.

While *state* officer suits regarding property in federal court sometimes may share this same remedy concern if not provided under state law, their primary basis for providing federal court jurisdiction is insuring the constitutional requirement of the supremacy of federal law.[5] *Ex Parte Young*, 209 U.S. 123 (1908).

Unlike the *federal* officer suits, the adequacy of a state court remedy has never been a basis for denying federal court jurisdiction in *state* officer suits under the *Ex Parte*

---

[4] "No person shall . . . be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation." U.S. Const. amend. V.

[5] "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the land; . . . " U.S. Const. art. VI, cl. 2.

Young doctrine, nor should it be.[6] The jurisprudential heart and soul of the *state* officer suit is maintaining the supremacy of federal law. Without it, the *Hans* expansion of the Eleventh Amendment would be unchecked, posing a serious threat to the delicate balance of sovereignties that has served this country so well for so long.

Four relatively recent cases form the present analytical basis for resolving disputes with state officers regarding property. They are *Florida Dep't of State v. Treasure Salvors, Inc.*, 458 U.S. 670 (1982); *Pennhurst State Sch. and Hosp. v. Halderman*, 465 U.S. 89 (1984); *Blatchford v. Native Village of Noatak*, 501 U.S. 775 (1991); and *Seminole Tribe of Florida v. Florida*, 116 S.Ct. 1114 (1996). All four will be discussed in detail in the next sections which address the Idaho officers' Eleventh Amendment arguments.

---

[6] The Idaho officers and amici Council of State Governments (Council) argue that the quiet title remedy provided by Idaho Code § 5-328 (1959) removes the justification for providing federal court jurisdiction. This is not so. The primary basis underlying jurisdiction in the *state* officer suit is insuring the supremacy of federal law, not providing a remedy. Pet. Br. p. 26, n. 6; Amicus Brief of the Council of State Governments at 15-19. When presented with a similar argument in the past, this Court stated: "It is no answer that the State has a law which if enforced would give relief. The federal remedy is supplementary to the state remedy, and the latter need not be first sought and refused before the federal one is invoked." *Monroe v. Pape*, 365 U.S. 167, 183 (1961).

B. This Case Satisfies the Three Pronged Jurisdictional Test Under the *Ex Parte Young* Doctrine.

The court of appeals carefully followed this Court's analysis of the *Ex Parte Young* doctrine as refined in *Treasure Salvors* and *Pennhurst*. Pet. App. 14-23. After holding that the suit could not be maintained against the state or state agencies, it held that the Tribe's claims for declaratory and injunctive relief were properly maintainable against the Idaho officers in federal court. The officers have taken exception with each prong of the court of appeals' determination under the *Treasure Salvors/Pennhurst* analysis.

1. First Prong: State officers are the proper party.

The first prong of the *Treasure Salvors/Pennhurst* analysis addresses who is the real party in interest. If the real party in interest is the state, the suit is barred by the Eleventh Amendment. If the real party in interest is the state officer, it is not barred. The court of appeals properly determined that the Tribe had alleged that tribal ownership was based on federal law and that the Tribe had further alleged the Idaho officers were attempting to regulate the Tribe's beds, banks and waters in violation of that federal law. It properly concluded that the officers were the real parties in interest because they were alleged to be doing the regulating sought to be enjoined.

The Idaho officers argue that the state is really the defendant and cite to the Complaint showing that relief was requested against the state itself. Of course it was.

The Tribe sued the state under the theory that because Idaho had defined its sovereignty narrowly as to property a federal court action to quiet title to property did not impact state sovereignty. Thus the suit was not barred by the Eleventh Amendment. *Roddy v. State*, 139 P.2d 1005 (*Id.* 1943); *Lyon v. State*, 283 P.2d 1105 (*Id.* 1955). The court of appeals rejected the Tribe's argument, Pet. App. 7-8, and certiorari was denied on the Tribe's petition. 116 S.Ct. 585 (1995). The Complaint would have been properly amended on remand to remove those allegations against the state, but instead certiorari was granted on this petition of the Idaho officers.

The essential inquiry is whether the injunctive relief can be divorced from title. It can. That is exactly what was done 100 years ago in *Tindal*. That is what was done in *Treasure Salvors*. That is what was done in the federal officer suits regarding property. That is what the court of appeals carefully did here, holding title could not be quieted against the state or state agencies, but that the federal court could grant declaratory relief confirming the tribe's title against everyone other than the state and its agencies, and could enjoin the Idaho officers. The *Ex Parte Young* doctrine is based on the premise that the state and its sovereignty is not implicated when a federal court enjoins a state officer from violating federal law.

The Idaho officers also argue that the state should be considered the real party because it is submerged lands that are being regulated and regulation of submerged lands is tied to sovereignty. As discussed above the submerged lands are just as important to the Tribe's sovereignty. Furthermore all cases under the *Ex Parte Young* doctrine impact important state sovereignty interests in

some way. *Florida Dep't of State v. Treasure Salvors, Inc.*, 458 U.S. 670 (1982) (attachment of personal property held by state); *Quern v. Jordan*, 440 U.S. 332 (1979) (operation of state programs); *Milliken v. Bradley*, 433 U.S. 267 (1977) (disbursal of state funds); *Scheuer v. Rhodes*, 416 U.S. 232 (1974) (administration of state national guard); *Ex Parte Young*, 209 U.S. 123 (1908) (power to enact state law); *Tindal v. Wesley*, 167 U.S. 205 (1897) (possession of real property held by state). Property cases are not unique.

Finally, the Idaho officers argue that a judgment will operate against the state because Idaho in fact owns Lake Coeur d'Alene. Saying that Idaho owns the lake does not make it so. If Idaho wants to come into federal court to claim ownership, it can. But until it does, the federal question before the court is simply the *Tribe's* ownership interest against the rest of the world other than Idaho and its agencies. The court of appeals properly found that the Tribe had satisfied the first prong of the analysis.

2. Second Prong: Tribe properly alleges ongoing violation of federal right.

The second prong of the *Treasure Salvors/Pennhurst* analysis considers the basis on which the officers' conduct is challenged. If the officers' conduct is a violation of federal law, or wholly unauthorized by state law, it is actionable in federal court. If the officers' conduct is merely tortious or *ultra vires* of his authorized state law duties, it is not. The court of appeals properly determined that the Tribe's Complaint had alleged an ongoing violation of a federal right sufficient to come within the *Ex Parte Young* doctrine. Pet. App. 13-14.

The Idaho officers argue from the *federal* officer line of suits regarding property that the Tribe's Complaint is insufficient as really only challenging tortious conduct. Further the Idaho officers argue from these and other *federal* officer suit cases that the case is really only a dispute over the interpretation of an admittedly constitutional federal statute. Pet. Br. 3-36.

Nowhere in this case is the Idaho officers' misunderstanding of the applicable law and its jurisprudential basis more clearly evident than in regard to the second prong of the *Treasure Salvors/Pennhurst* test. The Idaho officers start from the erroneous premise that *state* officer suits are just like *federal* officer suits and reach the erroneous conclusion that the Tribe's Complaint must be pled as if this were a federal officer suit. Pet. Br. 12 n.3, 30-36.

State officer suits are entirely different than their federal counterparts. The jurisprudential underpinning of *state* officer suits is balancing state sovereign immunity against the need for maintaining the supremacy of federal law. U.S. Const. art. VI, cl. 2. *Ex Parte Young*, 209 U.S. at 159-160. The jurisprudential underpinning of the *federal* officer suits is balancing federal sovereign immunity against the need to provide a remedy for violations of Fifth Amendment protection of property. *United States v. Lee*, 107 U.S. at 218.

A *state* officer's violation of a right secured by federal law is sufficient for this second prong of the *Treasure Salvors* analysis because of the need for the supremacy of federal law. *Treasure Salvors*, 458 U.S. at 685. *Pennhurst*, 465 U.S. at 105. *See also* U.S. Const. art. VI, cl. 2. But a *federal* officer suit is different. A violation of federal law is

not always sufficient. The claim must [illegible] constitutional taking or an explicit allegation [illegible] specific excedence of the officer's statutory auth[illegible]*arson*, 337 U.S. at 689-690.

A *federal* officer suit will be foreclosed where Congress provides a statutory remedy, *Block v. North Dakota*, 461 U.S. 273 (1983), but the same is not true regarding a *state* officer suit. *E.g., Tindal, Ex Parte Young*. This distinction stems directly from the differing jurisprudential underpinnings of state and federal officer suits.

In *Block*, this Court found the *federal* officer suit approach to no longer be necessary in the property context since the Quiet Title Act allows suits against the United States itself. Maintaining federal supremacy as against state authority, on the other hand, must still be pursued through state officer suits under *Ex Parte Young*. *Pennhurst* at 105.

The Idaho officers alleged that the Tribe's Complaint does not satisfy the *federal* officer suit standard. The Tribe's Complaint is well pled. *Oneida Indian Nation v. County of Oneida*, 414 U.S. 661, 666-667 (1974) (threshold allegation for a possessory action is the right to possession).

> Petitioners' assertion that they had a federal right to possession governed wholly by federal law cannot be said to be so insubstantial, implausible, foreclosed by prior decisions of this Court, or otherwise completely devoid of merit as not to involve a federal controversy within the jurisdiction of the District Court, whatever may be the ultimate resolution of the federal issues on the merits. . . . Given the nature and

> source of the possessory rights of Indian tribes to their aboriginal lands, particularly when confirmed by treaty, it is plain that the complaint asserted a controversy arising under the Constitution, laws, or treaties of the United States within the meaning of both [28 U.S.C.] § 1331 and § 1362.

Id. (citations omitted). The Tribe's Complaint properly alleges Tribal ownership of the beds, banks and waters of navigable watercourses and state officer interference with that federal right. Complaint, ¶16-39, Br. in Opp. App. 7-13. There is no requirement to plead a taking or lack of remedy in a *state* officer suit. Even if a state wanted to "take" Indian land and pay compensation through a "state" remedy, they cannot because such is prohibited by federal statute. 25 U.S.C. § 177. *See County of Oneida v. Oneida Indian Nation*, 470 U.S. 226, 245 (1985).

The Idaho officers are similarly off the mark in their analysis of a "colorable claim" approach urged by the dissent in *Treasure Salvors* for state officer suits. The dissent in *Treasure Salvors* discussed "colorable claim" solely in the context of state officer conduct *ultra vires* of state law authority. That dissent urged a standard that if the state officer conduct was being challenged because it was allegedly *ultra vires* of state law, the suit should be barred if the state officer had a colorable claim of right under state law. *Treasure Salvors* at 702-717 (White, J., dissenting).

To put it another way, a state officer suit brought under an *ultra vires* theory could only be maintained if the state officer had absolutely no state law basis on which to justify his conduct.

This approach was later adopted in *Pennhurst*. *See Pennhurst* at 107-117. *Pennhurst* made clear that an action based on conduct of a state officer that was *ultra vires* of his state law authority could only be maintained if there was absolutely no state law basis for the state officer's conduct. *Pennhurst* at 114 n.25. The rationale underlying the state officer *ultra vires* approach is that a general violation of *state* law by the *state* officer did not violate federal supremacy and therefore the balance tips in favor of protecting state sovereign immunity. If, on the other hand, the state officer is acting in violation of *federal* law, the balance tips the other way, allowing the suit to be brought in federal court to protect the supremacy of federal law.

The Idaho officers now urge this Court to adopt a "colorable claim" standard for violation of *federal* law in a *state* officer suit. The proposed standard would be that if a *state* officer could state a "colorable claim" as to why his conduct does not violate *federal* law, then the federal court suit would be barred by the Eleventh Amendment.[7]

---

[7] The Idaho officers cite to *Kootenai Environmental Alliance v. Panhandle Yacht Club*, 671 P.2d 1085 (*Id.* 1983) for the proposition that Idaho owns Lake Coeur d'Alene. The Tribe was not a party to this case and the opinion contains no discussion of tribal ownership. In fact, ownership was not even litigated but it was assumed under *Shively*. *Id.* at 1088. *Kootenai* is no more controlling on this case than is *In re The Washington Water Power Company*, 1983 WL 37712 (F.E.R.C.), reversed on jurisdictional grounds 1988 WL 244511 (F.E.R.C.), which concluded that the Tribe owned a portion of Lake Coeur d'Alene. If any non-binding case is going to be looked to to see if any party has a "colorable claim" it should be the F.E.R.C. case because it at least considered the competing claims of ownership. If so the state does *not* have a colorable claim.

The clearest way to appreciate the fallacy of the state officer's proposed colorable claim standard is to analyze it in terms of the jurisprudential basis of the entire line of officer suit cases under *Ex Parte Young*. The underlying question in a *state* officer suit is whether the supremacy of federal law can be protected under the proposed standard. The obvious answer is that the state's "colorable claim" standard does not protect federal supremacy. The supremacy of federal law is not protected if a state officer can avoid federal court review by simply asserting a "colorable claim" that he is not violating federal law.[8]

Such a standard would severely limit a federal courts' ability to ensure the supremacy of federal law. Such a standard would be the first in what would undoubtedly prove to be a long line of cases where innovative Attorneys General define every state action as "property" or "affecting sovereignty just as much as property" in an effort to totally repeal the *Ex Parte Young* doctrine. Such an approach finds no support in this Court's prior opinions. Only this year the viability of *Ex Parte Young* was specifically reaffirmed as a viable and needed remedy to ensure the supremacy of federal law. *Seminole Tribe of Florida v. Florida*, 116 S.Ct. 1114, 1331, n. 14 (1996). The Idaho officers proposed "colorable claim" standard should be rejected.

The Idaho officers further argue that the supremacy of federal law is not at issue because they agree that the

---

[8] In fact, Idaho's officers urge more: that the rebuttable presumption described in *Montana v. United States*, 450 U.S. 544 (1981), satisfies the "colorable claim" standard sufficient to close the federal court doors to the Tribe.

result is controlled by federal law. Consequently, they argue, we only have conflicting interpretations of federal law, not a conflict of a state and federal law. This argument also misses the point. The interpretation of these federal laws is the core of this case. Under *Ex Parte Young* and *Pennhurst* the determination of whose interpretation is correct should be conducted by the federal court, not by the state's officers. The Idaho officers are regulating based on state laws which direct them to regulate submerged lands. The dispute is between those state laws and the federal law which the Tribe alleges render the Idaho officers' regulation unlawful.

This argument is just a recycled version of their "colorable claim" argument and fails for the same reason. In practically every *Ex Parte Young* type case the state officer will be able to argue that the dispute is just over differing interpretations of federal law and that there is really no dispute between state and federal law. Such an approach would not protect federal supremacy.

3. Third Prong: Tribe seeks only prospective relief.

The third prong of *Treasure Salvors* addresses the remedy. If the remedy requested is retrospective or for damages, the suit is barred by the Eleventh Amendment. *Blatchford v. Native Village of Noatak*, 501 U.S. 755 (1991). If the remedy requested is only for prospective relief, the suit is not so barred. *Id.* at 788. *Quern v. Jordan*, 440 U.S. 332, 337 (1979).

The court of appeals carefully implemented the principles established by this Court. It concluded that the

Eleventh Amendment barred federal courts from quieting the state's title to property in which the state claims an interest, but did not bar injunctive or declaratory relief that put a plaintiff in possession of property. Pet. App. 16. The court of appeals noted that *Tindal* made clear a remedy sought against a state officer was not barred just because the officer was in possession as a result of the state's claim of ownership. *Treasure Salvors*, 458 U.S. at 685-687, *citing Tindal*, 167 U.S. 204 (1897). Pet. App. at 15.

The court of appeals concluded its analysis by noting that the Tribe sought only prospective relief and not damages or restitution. It held that the Eleventh Amendment did bar a determination that would later preclude the state or its agencies, but did not bar a determination of tribal ownership against all others besides the state and its agencies nor did the Eleventh Amendment preclude prospective injunctive relief. Pet. App. at 21-24.

The Idaho officers argue that the case does not satisfy the policies set out in *Papasan v. Allain*, 478 U.S. 265 (1986), and is therefore barred by the Eleventh Amendment. But *Papasan* simply held that the Eleventh Amendment bars an injunction of a state officer violating state, not federal, law. More important to this case, *Papasan* also found state officer suits under *Ex Parte Young* are allowed because the need to ensure the supremacy of federal law takes precedence over state Eleventh Amendment sovereign immunity considerations. *Id.* at 292. This case is fully supported by that proposition.

The Idaho officers then argue that the Tribe's alleged ownership comes from the executive order issued over

100 years ago and the relief would constitute retroactive relief. If the Idaho officers are attempting to argue *laches*, that theory has been rejected for such cases. *Oneida Indian Nation v. County of Oneida*, 414 U.S. 661 (1974). The Tribe seeks only prospective relief, or in the words of *Papasan* "relief against the state official [that] directly ends the violation of federal law." *Papasan*, 478 U.S. at 278.

The court of appeals properly applied the *Treasure Salvors/Pennhurst* three-pronged Eleventh Amendment analysis to this *state* officer suit regarding property. It properly limited the relief available in accordance with this Court's prior holdings. The alternative "colorable claim" standard proposed by the Idaho officers is not supported by this Court's prior holdings and cannot survive scrutiny when analyzed under the jurisprudential basis for *state* officer suits. The court of appeals should be affirmed.

C. Federal Court is the Proper Tribunal to Resolve Serious Disputes Between Sovereigns.

It is essential to consider the consequence of the relief requested by the Idaho officers.

If the Eleventh Amendment is held to bar federal court resolution of such important interests between sovereign tribes and sovereign states, then where will they be decided? The Idaho officers suggest state court. An equally viable forum would be tribal court. *See Nat'l Farmers Union Ins. Cos. v. Crow Tribe*, 471 U.S. 845 (1985) (tribal courts have initial jurisdiction to consider federal questions).

The Tribe readily agrees with the Idaho officer statement that "[t]his Court has long recognized the 'problems of federalism inherent in making one sovereign appear against its will in the courts of the other. . . . ' " Pet. Br. 21 *citing Employees v. Missouri Dep't of Public Health and Welfare*, 411 U.S. 279, 294 (1973) (Marshall, J., concurring). This is a basic tenant of federalism, although the Idaho officers failed to cite the footnote in *Employees* that pointed out that such is regularly done in *Ex Parte Young* situations.[9] But where this language from *Employees* is most applicable is where a state is forced to go into tribal court or the tribe is forced to go into state court.

If Eleventh Amendment bars the doors of the federal court in this type of situation, the practical reality is that any sovereign will use their own courts. The result would likely be conflicting default judgments without resolving anything and creating a volatile situation in the process.

This Court has developed an appropriate test in another context that could prove helpful here. In deciding whether to exercise its original discretionary jurisdiction

---

[9] The footnote in *Employees* reads: "Of course, suits brought in federal court against state officers allegedly acting unconstitutionally present a different question, see *Ex Parte Young*. Likewise, suits brought in federal court by the United States against States are within the cognizance of the federal judicial power, for '(t)he submission with respect to the objects committed to it, and neither sovereign with respect to the objects committed to the other,' . . . but both subject to the supreme law of the land, does no violence to the inherent nature of sovereignty. Moreover, it is unavoidable that in a suit between a State and the United States one sovereign will have to appear in the courts of the other." *Id.* at 294, n.9 (citations omitted).

over disputes between states, this Court has looked at the nature of the dispute and the availability of alternative forums.

> 'The model case for invocation of this Court's original jurisdiction is a dispute between State of such seriousness that it would amount to *casus belli* if the States were fully sovereign.' Second, we explore the availability of an alternative forum in which the issue tendered can be resolved.

Mississippi v. Louisiana, 506 U.S. 73, 77 (1992) (citations omitted) (emphasis added).

Although tribal sovereignty and state sovereignty differ in various aspects, such a test would be appropriate in a case between a sovereign Indian tribe and the officers of a sovereign state. Ownership and control of lakes and rivers would certainly be the type of dispute which would be a *casus belli* if the tribe and state were "fully sovereign." Meaningful alternative forums are not reasonably available because neither sovereign would likely go into the other's courts. The *Mississippi* test provides a good analytical basis for the exercise of federal court jurisdiction.

It is also appropriate to examine the two major jurisdictional statutes under which the district court jurisdiction was originally invoked. These are: 28 U.S.C. § 1362 and 28 U.S.C. § 1331.

28 U.S.C. § 1362 specifically gives an Indian tribe the right to sue in federal court.[10] This Court explained that it was Congress' intent to allow Indian tribes to invoke federal court jurisdiction when the United States chose not to bring suit on their behalf.

> Congress contemplated that § 1362 would be used particularly in situations in which the United States suffered from a conflict of interest or was otherwise unable or unwilling to bring a suit as trustee for the Indians, and its passage reflected a congressional policy against relegating Indians to state court when an identical suit brought on their behalf by the United States could have been heard in federal court.

Arizona v. San Carlos Apache Tribe of Arizona, 463 U.S. 545, 559 (1983) (citations omitted).

Blatchford v. Native Village of Noatak held that § 1362 was not a congressional waiver of a state's Eleventh Amendment immunity from suit in federal court. *Blatchford* did not address the *Ex Parte Young* type injunctive relief. *Blatchford v. Native Village of Noatak*, 501 U.S. at 788.

The instant case presents an aspect of that question left unaddressed in *Blatchford* – the question of whether an Indian tribe can sue state officers in federal court regarding property under a *Tindal/Ex Parte Young* theory.

---

[10] "The district courts shall have original jurisdiction of all civil actions, brought by any Indian tribe or band with a governing body duly recognized by the Secretary of the Interior, wherein the matter in controversy arises under the Constitution, laws, or treaties of the United States." 28 U.S.C. § 1362 (1966).

The other jurisdictional statute is 28 U.S.C. § 1331, which grants jurisdiction over federal question. Jurisdiction under § 1331 is appropriate because there are federal questions involved. This is a unique situation – separate sovereigns (tribal and state) claiming the same property. If this Court chooses to limit its holding, 28 U.S.C. § 1362 provides an appropriate jurisdiction basis limited to the Indian context.

Another aspect of jurisdiction involves the process used by the district court in the jurisdiction inquiry in a case under the *Ex Parte Young* doctrine. If federal law has been violated, the federal court has jurisdiction to enjoin the violation. If federal law has not been violated there is no jurisdiction. There is the occasional case where the jurisdictional issue is entwined with the merits. Idaho concedes that this is one of those cases. Pet. Br. at 8-10. It has long been held that since a federal court always has jurisdiction to determine its jurisdiction, the court therefore has jurisdiction to proceed to the merits of the case. In the officer property case of *Land v. Dollar*, 330 U.S. 731, 739 (1946), this Court held: "[W]e intimate no opinion on the merits of the controversy. We only hold that the district court has jurisdiction to determine its jurisdiction by proceeding to a decision on the merits."

In this case the district court did not follow that direction. After finding that it would have jurisdiction over the Idaho officers under *Ex Parte Young* if there was a violation of federal law, it went to the factual merits on a Fed.R.Civ.P. 12(b) motion without the benefit of

affidavits or other evidence.[11] All the court of appeals did was remand the case for consideration of jurisdiction and the merits under the normal procedural avenues such as summary judgment or trial. This is nothing exceptional. The same basic approach has existed since *Tindal*.

Finally it is appropriate to address the suggestion of abstention raised by the Idaho officers' amici Council of State Governments. Council Amici Br. at 19-26.

Abstention serves no purpose in this case.[12] It would be contrary to congressional intent regarding a specially

---

[11] This Court in 1974 explained the proper review standard for an Eleventh Amendment case in the same procedural stance as the present one. *Scheuer v. Rhodes*, 416 U.S. 232 (1974). "When a federal court reviews the sufficiency of a complaint, before the reception of any evidence either by affidavit or admissions, its task is necessarily a limited one. The issue is not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims. . . . 'In appraising the sufficiency of the complaint we follow, of course, the accepted rule that a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.' " *Id.* at 235. (citations omitted).

[12] This Court has held abstention proper in only two types of Indian cases. The first is in the water rights field where Congress had enacted the McCarren Amendment, 43 U.S.C. § 666 (1952) giving state courts concurrent jurisdiction over the adjudication of federal water rights. Abstention was found proper where there was an ongoing state court adjudication. *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800 (1976). The second is in the tribal court field requiring tribal judicial remedies be exhausted as a matter of comity before invoking federal court jurisdiction. *Nat'l Farmers Union Ins. Cos. v. Crow Tribe*, 471 U.S. 845 (1985). *Iowa Mutual Ins. Co. v. LaPlante*, 480 U.S. 9 (1987). Neither are appropriate here.

enacted jurisdictional statute. Congress, in exercise of its constitutionally based plenary power over Indian affairs, has specifically conferred federal court jurisdiction over suits brought by Indian tribes. 28 U.S.C. § 1362 (1966). *See Morton v. Mancari*, 417 U.S. 535 (1974) (Congress' plenary power in Indian matters is constitutionally based).

Abstention has merit only in rare instances such as the furtherance of a congressional policy and only then when there is a viable alternative remedy. Here, abstention would be directly opposed to the congressional policy expressed in the adoption of 28 U.S.C. § 1362. Furthermore as discussed above there is not a viable alternative forum.

This Court's current holdings do not deprive the federal court of jurisdiction to hear this state officer property suit on Eleventh Amendment grounds. There is no justification for departing from the long held approach of *Tindal* and *Ex Parte Young* nor is there any justification for abstention.

II. THE PRESIDENT MAY SET APART OR CONVEY SUBMERGED LANDS AND INTERESTS IN THEM BY EXECUTIVE ORDER WITHOUT PRIOR CONGRESSIONAL DELEGATION

It has long been held that the President can create Indian reservations by executive order. *United States v. Midwest Oil*, 236 U.S. 459 (1915); *Sioux Tribe v. United States*, 316 U.S. 317 (1942). It is also established law that unless previously conveyed or later condemned, states receive title to submerged lands at statehood under the equal footing doctrine. *Shively v. Bowlby*, 152 U.S. 1 (1894);

Block v. North Dakota, 461 U.S. 273, 291 (1983). It is further clear that the United States can convey submerged lands to Indian Tribes as part of their reservation. *Alaska Pacific Fisheries v. United States*, 248 U.S. 78 (1918). *Choctaw Nation v. Oklahoma*, 397 U.S. 620 (1970).

In the second question presented the Idaho officers ask this Court to hold that there was a never before known limitation on the President's power to create Indian reservations.[13] The Idaho officers ask this Court to rule that the President could never, as a matter of law, set apart submerged lands for an Indian tribe by executive order unless Congress expressly delegated that authority to him. This standard would preclude any factual inquiry into the intent and understanding of Congress, the President and the Tribe. It finds no support in this Court's prior cases.

This Question raises issues involving the respective powers, responsibilities and limitations of Congress and the President regarding federal property under the Property Clause. U.S. Const. art. IV, § 3, cl. 2. This Court has considered the property clause tension between Congress and the President regarding Indian reservations in three major cases: *United States v. Midwest Oil Co.*, 236 U.S. 459 (1915); *Holden v. Joy*, 84 U.S. (17 Wall.) 211 (1872); and *Sioux Tribe of Indians v. United States*, 317 U.S. 317 (1942). A fourth case that dealt with Indian reservations is *Arizona v. California*, 373 U.S. 546 (1963). Each of these cases will be discussed in detail below. None support the Idaho

---

[13] Since 1919 the President has been statutorily prohibited from creating Indian reservations by Executive Order. 43 U.S.C. § 150.

officers' proposition that *as a matter of law* prior congressional delegation of authority is necessary before the President could set apart or convey submerged lands. Instead they strike a practical balance looking at how Congress responded to the President's actions either through acquiescence, *Midwest Oil*, outright congressional recognition of the reservation, *Holden*, and the intent of both Congress and the President, *Sioux Tribe*. A factual inquiry is required.

A. Congressional Acquiescence Validates Presidential Reservation and Setting Apart of Submerged Lands.

The Idaho officers' proposed submerged land exception to *Midwest Oil* cannot withstand close scrutiny under that same case. In *Midwest Oil*, this Court specifically held that the President, acting as Congress' agent and with Congress' acquiescence, could validly reserve federal lands or interest in those lands. *Id.* at 475. Rather than basing its decision on the narrow grounds of the President's Commander-in-Chief powers, the Court chose the broader ground of congressional acquiescence to the President reserving lands by executive order. *Midwest Oil* cited with approval 99 Indian reservations, 109 military reservations and 44 bird reserves as the basis for the congressional acquiescence doctrine. *Id.* at 470. One of those reservations was the Coeur d'Alene Reservation. 1913 Comm'r Indian Affairs Rep. 70-87 (itemizing the 99 Indian reservations set apart by executive order) *quoted in Midwest Oil*, 236 U.S. at 470 n.1. App. 58.

The Idaho officers seek to justify their proposed exception on stray language in *Midwest Oil* which they cite for the proposition that congressional acquiescence to presidential reservations applies only to uplands, not to submerged lands. Pet. Br. 41-42. The analysis fails because of the 44 bird reserves in *Midwest Oil*. 236 U.S. at 470 n.1. Many of the bird reserves included submerged lands. Bird refuges such as Klamath Lake, Lake Malheur, Island Bay, Salt River, Keechetus Lake, Kachess Lake, Chatum Lake, Bumping Lake, and Bering Sea certainly involve submerged lands. Some were pre-statehood and navigable such as the Bering Sea. App. 53, 56. Some were not such as Lake Malheur. *See United States v. Oregon*, 295 U.S. 1 (1935). Many factors must be considered to determine if the executive order reserved or set apart submerged land. A factual inquiry is needed. *Midwest Oil* does not support the Idaho officers' proposed submerged lands exception that would bar any factual inquiry.

No decision of this Court has ever suggested that a different standard should be applied to submerged lands than to uplands on Indian reservations created by executive order. *Midwest Oil* specifically recognized the validity of bird reserves containing submerged lands. *Midwest Oil* specifically recognized the validity of the 1873 Coeur d'Alene Reservation. The validity of the 1873 Coeur d'Alene Reservation cannot now be challenged for submerged lands purposes, or for any other purpose.

B. Congressional Recognition Validates Presidential Reservation and Setting Apart of Submerged Lands.

In *Holden v. Joy*, 84 U.S. (17 Wall.) 211 (1872), the Court considered the validity of a treaty between the Cherokee Nation and the United States. The terms of the treaty exceeded the express delegation of authority by Congress to the President. *Id.* at 238-239. Recognizing that a treaty is confirmed only by the Senate, not by Congress, one party challenged that portion of the treaty which exceeded the Congressional delegation on property clause grounds. *Id.* at 242-243. It was argued that only Congress could convey property. *Id.* at 247. The validity of the treaty was defended on the basis of the President's treaty making power. The Court found it unnecessary to reach the President's treaty powers because Congress had specifically recognized the validity of the treaty by enacting appropriation statutes.

> It is not necessary to decide the question in this case, as the treaty in question has been fully carried into effect, and its provisions have been repeatedly recognized by Congress as valid.

Id.

Holden struck the balance between Congress and the President regarding the setting apart of Indian lands. To hold rigidly that the property clause required Congress – both houses – to set apart Indian lands would have invalidated nearly 100 years of Indian treaties. Conversely, to hold that the President could treat with Indians under his treaty powers or Commander in Chief powers would have undermined Congress' property

clause power.[14] The balance was struck that allowed later congressional recognition to validate the prior action. The Idaho officers did not discuss or even cite *Holden*.

Here, there are three specific instances in which Congress statutorily recognized the validity of the Coeur d'Alene Reservation *prior* to Idaho becoming a state.

First, Congress expressly recognized the 1873 Coeur d'Alene Reservation by *statute* in 1886 (4 years before statehood) when it enacted Chapter 333, which directed the Commission to negotiate with the Coeur d'Alenes for the removal of other Indians to their reservation and for the cession of territory "outside the limits of the present Coeur d'Alene Reservation. . . . " An Act Making Appropriations for the Current and Contingent Expenses of the Indian Department, and for Fulfilling Treaty Stipulations with Various Indian Tribes for the Year Ending June 30, 1887, and for Other Purposes, 24 Stat. 44 (1886). App. 7, 8.

The second and third times Congress expressly recognized the validity of the 1873 Coeur d'Alene Reservation, including its navigable waters, were in 1888 and 1889 (1-2 years before statehood). In January 1888, the Senate, by resolution asked the Department of Interior to inform it of several things including: (1) the present area and boundaries of the Coeur d'Alene Reservation, (2) whether the Coeur d'Alene Reservation included any of

---

[14] "The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States; and nothing in this Constitution shall be so construed as to Prejudice any Claims of the United States, or of any particular State." U.S. Const. art. IV, § 3, cl. 2.

the navigable waters of Lake Coeur d'Alene and the Coeur d'Alene and St. Joseph Rivers, and (3) "*whether it is advisable to release any of the navigable waters* aforesaid for the limits of such reservation." S. Exec. Doc. No. 76, 50th Cong., 1st Sess. (1888) (emphasis added). App. 16, 17.

The Department of the Interior responded to the Senate in February 1888 with a lengthy and detailed account of the Coeur d'Alene Reservation. S. Exec. Doc. No. 76, 50th Cong., 1st Sess. 1-7 (1888). App. 16-31. It stated that Lake Coeur d'Alene and the Coeur d'Alene River were navigable (it did not know about St. Joseph), and within the Coeur d'Alene Reservation.

> . . . [T]he reservation appears to embrace all the navigable waters of Lake Coeur d'Alene, except a very small fragment cut off by the north boundary of the reservation which runs "in a direct line" from the Coeur d'Alene Mission to the head of Spokane River.

Id.

The Department of the Interior also informed the Senate that it would be advisable for the purchase of some of the reservation's navigable waters.

> . . . [C]hanges could be made in the boundaries for the release of some or all of the navigable waters therefrom, which would be of very great benefit to the public; but this should be done, if done at all, with the full and free consent of the Indians, and they should, of course, receive proper compensation for any land so taken.

Id.

Although this Department of the Interior Report gives much general information about the Coeur d'Alene Reservation,[15] there remain volumes of additional evidence to be presented at trial regarding the United States' intent, the Tribe's understanding, the surrounding circumstances including the exigent circumstances and all of the other necessary factual considerations.

---

[15] The Interior report also generally informed the Senate that there had been an issue regarding the "sale of liquor upon the Steamer Coeur d'Alene within the navigable waters of the reservation . . . ," which was only an issue because of a federal statute at the time prohibiting the sale of liquor on Indian reservations. The specifics of this enforcement action are not in the record because of the premature procedural posture of the case. App. 23.

The Coeur d'Alene allowed non-Indians to freely cross the reservation as a result of the Peace Treaty of 1858 in which the United States elicited from the Coeur d'Alenes an agreement to allow non-Indians undisturbed passage through the Reservation.

> The Chiefs and head Men of the Coeur d'Alene Nation, promise that all white persons, shall travel through their country unmolested, and that no Indians, hostile to the United States shall be allowed within the limits of their country.

Treaty of Peace and Friendship between the United States and the Coeur d'Alene Indians, Sept. 17, 1858, art. 4.

This peace treaty in effect was another recognition by the United States of tribal ownership of Lake Coeur d'Alene and the Tribe's subjecting its ownership of the lake to what has come to be known as the United State's navigable servitude. By allowing steamers such as the Coeur d'Alene to cross its lake and rivers, the Coeur d'Alene Tribe was simply keeping its word given in 1858.

In May of 1888 (two years before statehood), Congress again expressly recognized the Coeur d'Alene Reservation by *statute* when it granted the Washington and Idaho Railroad a right of way through the Coeur d'Alene Reservation conditioned upon: (1) prior tribal approval, (2) compensation paid to the Tribe by the railroad for the right of way, (3) the railroad not seeking additional Coeur d'Alene tribal land, and (4) any violation of the act forfeiting the right of way. An Act Granting to the Washington and Idaho Railroad Company the Right of Way through the Coeur d'Alene Indian Reservation, ch. 336, 25 Stat. 160-161 (1888). App. 32-35.

This right of way statute is a Congressional enactment treating the Reservation as fee ownership in the Tribe, subject to trusteeship. Tribal consent and compensation were required. If Congress did not consider the Coeur d'Alene Reservation to be a valid federal conveyance to the Tribe, this railroad right of way statute would have been totally unnecessary.

The next year, 1889 (one year before statehood), Congress again expressly recognized the Coeur d'Alene Reservation by *statute* when it directed the Secretary of the Interior to purchase "portions of its [Coeur d'Alene] reservation . . . as such [Coeur d'Alene] tribe shall consent to sell." An Act Making Appropriations for the Current and Contingent Expenses of the Indian Department, and for Fulfilling Treaty Stipulations with Various Indian Tribes, for the Year Ending June 30, 1890, and for Other Purposes, ch. 412, 25 Stat. 1002 (1889). App. 36, 37. Again Congress recognized the Coeur d'Alene Reservation as valid and creating property rights in the Tribe that required purchase.

These three statutes in 1886, 1888 and 1889 make clear that regardless of the President's authority when he "set apart" the Coeur d'Alene reservation by executive order in 1873, Congress later expressly recognized the validity of the reservation prior to Idaho's statehood. *See Holden v. Joy*, 84 U.S. (17 Wall.) 211 (1872). The latter two statutes were passed with Congress' explicit understanding that the reservation contained submerged lands under navigable waters. The United States had properly "set apart" the submerged lands in the Coeur d'Alene Reservation before Idaho became a state. Idaho did not receive these submerged lands under the equal footing doctrine because of this prior conveyance. *See Shively v. Bowlby*, 152 U.S. 1 (1894).

C. Congressional and Presidential Intent Determines Executive Order Conveyances of Land and Executive Order Reservations Include Land and Water.

The Idaho officers overstate the import of *Sioux Tribe v. United States*, 316 U.S. 317 (1942) in the text of the second Question Presented. *Sioux Tribe* establishes that a factual inquiry into the understanding of Congress and the President is the appropriate test when considering whether an executive order in fact conveyed a compensable interest.

> The basis of decision in United States v. Midwest Oil Co. was that, so far as the power to withdraw public lands from sale is concerned, such a delegation could be spelled out from long continued Congressional acquiescence in the executive practice. *The answer to whether a similar delegation occurred with respect to the power to convey a compensable interest in these lands to the Indians must be found in the available evidence of what consequences were thought by the executive and Congress to flow from the establishment of executive order reservations.*

Sioux Tribe of Indians v. United States, 316 U.S. 317 at 326 (1942) (emphasis added).

Nothing in *Sioux Tribe* precludes a Tribe from proving compensable title was conveyed by evidence that Congress and the President understood the consequence which flowed from the establishment of the executive order reservation was the grant of compensable title. Indeed the statutes and legislative history discussed above regarding *Holden* are proof of that very fact. Additional proof is: (1) the 1890 annual report of the Secretary of the Interior stating that the Coeur d'Alene Reservation was permanent and referring to the 1889 Act of Congress directing that the executive branch negotiate the purchase of a portion of the reservation, App. 37, and (2) the 1891 statute approving the negotiated agreement requiring payments. App. 40. The inquiry under *Sioux Tribe* is a factual one to be conducted by the district court.[16]

---

[16] The Idaho officers point to the "withdraw from sale" language of the 1873 Executive Order for the proposition that the intent was to reserve only the uplands because lakes and rivers are not to be sold. Pet. Br. 43, n.7. The Idaho officials fail to explain the "set apart as a reservation for the Coeur d'Alene Tribe" language. This is the operable language that was used in almost every treaty since the Cherokee Nation treaty to convey title to tribes when creating reservations. *See, e.g., Wilson v. Omaha Indian Tribe*, 442 U.S. 653 (1979).

The final case that addresses executive order reservations is *Arizona v. California*, 373 U.S. 546 (1963). One issue in this long running case addressed a state challenge to tribal water rights. The state argued that water rights (one of the usage rights at issue in this case) cannot be reserved by executive order. Rejecting that contention, this Court stated:

> Some of the reservations of Indians here involved were made almost 100 years ago, and all of them were made over 45 years ago. In our view, these reservations, like those created directly by Congress, were not limited to land, but included waters as well. . . . We can give but short shrift at this late date to the argument that the reservations either of land or water are invalid because they were originally set apart by the Executive.

Arizona v. California, 373 U.S. at 598. *See also Antoine v. Washington*, 420 U.S. 194 (1975) (fishing rights reserved by executive order).

Arizona v. California stands for the proposition that executive order reservations include both land and water. This certainly includes all usage rights in the water such as the ones in this case. This would also seem to include land under water, or submerged lands. There is nothing to the contrary. The Idaho officers' submerged land exception is foreclosed by *Arizona v. California*.

D. Factual Inquiries Are Required to Resolve Submerged Land Ownership Disputes.

Factual inquiries are required to resolve this case. As discussed above, there needs to be a determination of

whether the executive order operated as a grant or conveyance under *Holden* and to decide if Congress recognized the validity of the reservation. Under *Sioux Tribe* there needs to be a factual inquiry to ascertain the consequences that Congress and the President felt flowed from the establishment of the executive order reservation.

Under the other Tribal theories of ownership there also needs to be factual determination. Those theories include aboriginal title,[17] the effective date of the congressionally approved agreements between the Coeur d'Alene Tribe and the United States,[18] and tribal ownership through state law

---

[17] The Tribe alternatively claims ownership of the submerged lands on the theory of aboriginal title. *Johnson v. M'Intosh*, 21 U.S. 543 (1823) (recognizing Indian title of use and occupancy until extinguished). *Mitchel v. United States*, 34 U.S. 711 (1835) (Indian title considered as sacred as fee title). *United States v. Santa Fe Railroad*, 314 U.S. 339 (1941) (extinguishment of Indian title not lightly inferred). *County of Oneida v. Oneida Indian Nation*, 470 U.S. 226, 245 (1985) ("a sovereign act [is] required to extinguish aboriginal title."). The court of appeals remanded the aboriginal title issue. Pet. App. at 28. Certiorari was not requested or granted on the aboriginal title issue.

[18] The effective date of the Coeur d'Alene Reservation is 1887 (three years prior to statehood), the date of the Agreement ceding aboriginal lands and agreeing to various terms. The submerged lands were conveyed to the Tribe at that time. *See Northern Pacific R.R. v. Wismer*, 246 U.S. 283 (1918) (executive order reservation effective on date of agreement, not later date of issuance of Order); *Buttz v. Northern Pac. R. Co.*, 119 U.S. 55 (1886) (agreement with tribe effective when entered, Congress' ratification serves as acceptance of cession). *See also In re Washington Water Power Company*, 1983 WL 37712 (F.E.R.C.) (vacated on jurisdictional grounds) (Coeur d'Alene Reservation effective on pre-statehood date of agreements – 1887-1889 not post-statehood date of congressional approval thereby

regarding ownership of submerged lands at the time of establishment of the Reservation.[19]

To the extent the officers characterize the Question Presented as the court of appeals dispositive holding, it is a mischaracterization. All of these issues require a factual inquiry which did not occur at the district court or the court of appeals. The court of appeals simply remanded to the district court for this factual inquiry to take place.

There is also the separate factual inquiry under the tribal ownership of submerged land cases. Since *Shively v. Bowlby*, 152 U.S. 1 (1894), this Court has uniformly held that the determination of ownership in submerged land disputes requires a factual inquiry. This case is no different.

The general rule is that pre-statehood, the submerged lands under navigable waters are held by the United States for the future states' ownership "on equal footing"

---

defeating Idaho equal footing claim to a portion of Lake Coeur d'Alene).

[19] At the time of creation of the Coeur d'Alene Reservation the Idaho law was that the riparian or littoral owner owned to the middle of the stream or lake. *United States v. Ladley*, 4 F.Supp. 580 (D.Id. 1933) (at the time of Idaho statehood and for the next 25 years Idaho did not claim ownership of submerged lands under either navigable or non-navigable watercourses). The creation of the reservation is a matter of federal law, but state law is looked to to determine certain ownership issues of submerged land. Since the Tribe was the riparian and littoral owner, the submerged land became part of the reservation at that time (if title had passed to Idaho under the equal footing doctrine).

with the original 13 states. *Pollard v. Hagan*, 44 U.S. (3 How.) 212 (1845).

But the original 13 states did not consider submerged lands of particularly great importance. With the exception of a few large rivers, only three of the original 13 states claimed ownership of all submerged lands under fresh-water inland navigable streams. *Shively v. Bowlby*, 152 U.S. 1, 31 (1894). In the other ten, the riparian property holders owned some or all of the submerged lands. *Id.* Other submerged lands were also dealt with in a variety of manners. *Id.* at 18-26.

Shively struck the balance between various competing interests. The balance adopted was that pre-statehood, the federal government could, for an appropriate public purpose, make a conveyance of submerged lands to others. *Id.* at 57-58. Otherwise the federal government would generally hold the title to submerged lands of navigable watercourses below the high water mark for the future states at statehood.

There are four leading cases which have addressed disputes involving tribal ownership of submerged lands. In two of the cases the Indian tribes prevailed. *Alaska Pacific Fisheries v. United States*, 248 U.S. 78 (1918) (the reservation established for the Metlakahtlan Indians included the submerged lands surrounding the Annette Islands); *Choctaw Nation v. Oklahoma*, 397 U.S. 620 (1970) (the treaty setting apart the Choctaw Reservation included the Arkansas River in the reservation). The Idaho officers did not address or even cite these cases.

States' interests have prevailed in the two other cases. *United States v. Holt State Bank*, 270 U.S. 49 (1926)

(creation of the Red Lake reservation did not convey ownership of the submerged lands to the Red Lake Chippewas). *Montana v. United States*, 450 U.S. 544 (1981) (creation of the Crow Reservation did not convey ownership of the Big Horn River to the Crows).[20] The Idaho officers cited to *Montana* "passim".

Under the principles set forth in these four cases the resolution of disputes between Indian tribes and states is almost totally fact based. The central factual inquiries are: (1) the wording of the document creating or recognizing this reservation, (2) the intent and understanding of the United States and (3) the intent and understanding of the Tribe. *Montana* established a "strong presumption" of state ownership, but like any presumption, it can be overcome with facts.

There are also the well settled rules of construction that are to be applied in Indian cases. Documents creating Indian reservations are to be construed "in the sense in which they would naturally be understood by the Indians." *Washington v. Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 676 (1979) *quoting Jones v. Meehan*,

---

[20] The *Montana* Court rejected the reasoning of a prior court of appeals' decision of the same factual issue in the unrelated criminal case regarding public exigencies and the tribe's dependency on fishing, and came to the opposite result. *United States v. Finch*, 548 F.2d 822, 829 (9th Cir. 1976) (Kennedy, Circuit Judge). Unlike the Crow Tribe, however, the Coeur d'Alenes are traditionally a fishing people and have been dependent on Lake Coeur d'Alene for that purpose from time immemorial. At trial, the Tribe will offer evidence to this effect, as well as the lake's importance to them culturally, for commerce, and other purposes.

175 U.S. 1, 11 (1899). Second, "statutes are to be construed liberally in favor of Indians with ambiguous provisions interpreted to their benefit." *South Dakota v. Bourland*, 508 U.S. 679, 687 (1993) *citing County of Yakima v. Yakima Indian Nation*, 502 U.S. 251, 269 (1992) (citations omitted); *Bryan v. Itasca County*, 426 U.S. 373 (1976); *Antoine v. Washington*, 420 U.S. 194 (1975); *See also, Alaska Pacific Fisheries v. United States*, 248 U.S. 78 (1918).

E. Federal Government Submerged Land Reservation Test is Inappropriate for an Indian Tribe.

In their brief the Idaho officers raise the issue of whether the court of appeals erred holding the *Montana* test,[21] rather than the *Utah* test,[22] should be used when the facts of this case are considered. This issue seems to be well beyond either Question Presented, but having been raised it must be addressed.

The basis of the Idaho officers' argument is that this is a "reservation" not a "conveyance", and therefore this

---

[21] The *Montana* submerged lands test is that a state is entitled to a strong presumption of ownership. The presumption can be overcome by evidence that the United States intended to set apart the submerged land for the Tribe. *Montana v. United States*, 450 U.S. 544, 552-554 (1981).

[22] *Utah Division of Lands v. United States*, 482 U.S. 193, 202 (1987). The *Utah* submerged lands test is that a state is entitled to a strong presumption of ownership. The presumption can be overcome by facts that the United States intended to include submerged lands in the reservation *and* to defeat future state title.

must be analyzed under the *Utah* test because *Utah* dealt with a "reservation." Pet. Br. 44. There is no basis for applying the *Utah* test in this Indian case. The *Utah* test was developed for use when the United States reserves for itself. As *Utah* pointed out, there will always be confusion as to whether the United States is reserving for some particular management objective or intends to defeat future state title. *Utah*, 482 U.S. at 202. The intent should be clarified.

When the United States formally "sets apart" an Indian reservation, like was done in this case, it is in the nature of a conveyance that the intent is to vest some degree of title in the tribe. Consequently, the *Montana* test is appropriate.

The court of appeals also correctly noted that this Court must have intended the *Utah* test not to apply to Indian reservations because of the wording in *Utah*. Pet. App. 25-26. In *Utah*, this Court stated it had never addressed whether the "reservation" of submerged lands could defeat future state title under the equal footing doctrine. Because that issue had been considered in a "set apart" Indian reservation several times before, the court of appeals properly concluded that the *Utah* test was not intended by this Court to be applicable to the Indian reservation situation. Pet. App. 25-26. The *Montana* test is to be applied in this case.

CONCLUSION

At the direction of the United States Congress the Northwest Indian Commission in 1887 traveled to Coeur d'Alene territory for the specific purpose of obtaining a cession agreement for lands outside its 1873 Reservation. When concluded, the agreement contained the solemn promise that the Reservation:

> shall be held forever as Indian land and as homes for the Coeur d'Alene Indians . . . and their posterity; and no part of said reservation shall ever be sold, occupied, open to white settlement, or otherwise disposed of without the consent of the Indians residing on said reservation.

App. 42. In explaining this provision to Congress the Indian Commission wrote:

> It may be said that this [clause] was unnecessary, inasmuch as no such thing would happen; but the loss of their former possessions and other causes had so excited their fears that it was concluded, in order to allay suspicion, and *in as strong a manner as possible, bind the Government to that good faith which the Indian prizes so highly and which he thinks has been violated so frequently.*

1983 WL 37712 (F.E.R.C.) (quoting House Executive Document No. 63, 50th Congress, 1st Sess.) (emphasis added). Certainly, both sides to that agreement valued those terms to have the same meaning and effect as the Choctaw Nation and the United States understood the treaty to have as interpreted in *Choctaw Nation v. Oklahoma*. Yet more than 100 years after those promises were made, the Coeur d'Alene Tribe confronts obstacles to proving their

claim which their ancestors could not have conceivably contemplated.

The State's officers seek the cover of the State's Eleventh Amendment immunity to bar Tribal access to the only forum suited to resolve federal property interest questions. In case that proves insufficient, the officers further seek protection of a theory which denies the historical reality of Executive and Legislative practices establishing Indian reservations. While these obstacles were unforeseeable in 1887, they make clear the reasons underlying the need felt by Tribal leaders for a demonstration of good faith.

Contrary to the officers' positions, the doctrines and cases developed by this Court around the issues presented in this matter do not bar access to the federal court. Nor do they so easily and silently take from the Tribe that which was promised. Instead, they clear the path for the Tribe to have its claims justly adjudicated.

For the foregoing reasons, the Ninth Circuit Court of Appeals should be affirmed.

Respectfully submitted,

RAYMOND C. GIVENS*
Attorney for Respondents

SHANNON D. WORK
Attorney for Respondents

GIVENS, FUNKE & WORK
424 Sherman Avenue, Suite 308
Coeur d'Alene, Idaho 83814
(208) 667-5486

Attorneys for Respondents

*Counsel of Record

APPENDICES
TABLE OF CONTENTS

APPENDICES
TABLE OF CONTENTS – Continued

APPENDIX 1

The
Pacific Northwest Quarterly
Vol. 34 April 1943 Number 2
at pp. 178-180 (VIII)

Father Joset

Head Quarters Expedt against Northn
Indians Camp, near the Coeur d'Alene
Mission W.T.

September 17th 1858

Rev. Sir,

Inclosed herewith, is a copy of the Treaty this day made between the United States and the Coeur d'Alene Nation: I will thank you to place it in the hands of the head chief of the tribe.

I beg of you to express to the chiefs of the Coeur d'Alenes, the great pleasure I have felt, in seeing them come with all their people, promptly and willingly, and acknowledging their error, & putting their trust in us in all things.

Now my dear sir, I must thank you very sincerely for your zealous and persevering efforts in bringing about this accomadation, (sic) which has terminated so successfully.

With great regard
I remain very Respy
G. Wright
Col. 9th Infy
Commander U.S. Troops

Rev. Father Joset
Sac. Heart Missn

Preliminary articles of a Treaty of peace
and friendship between the United States
& the Coeur d'Alene Nation of Indians
Sept. 17th 1858.

(Official Copy)
G. Wright
Col. 9th Infry
Commander U.S. Troops

Preliminary Articles of a Treaty of Peace and Friendship between the United States and the Coeur d'Alene Indians.

Art. 1′ Hostilities between the United States and the Coeur d'Alene Indians shall cease from and after this date, 17′ September 1858.

Art. 2′ The Chiefs and head Men of the Coeur d'Alene Indians for, and in behalf of the whole nation, agree and promise, to surrender to the United States all property in their possession, belonging either to the government, or to individuals, whether said property was captured, or abandoned by the Troops of the United States.

Art. 3′ The Chiefs and head Men of the Coeur d'Alene Nation, agree to surrender to the United States, the men who commenced the Battle with Lt. Col. Steptoe, contrary to the orders of their chiefs, and also to give at least One chief and four men with their families, to the Officer in Command of the Troops, as hostages for their future good conduct.

Art. 4′ The Chiefs and head Men of the Coeur d'Alene Nation, promise that all white persons, shall travel through their country unmolested, and

that no Indians, hostile to the United States shall be allowed within the limits of their country.

Art. 5′ The Officer in command of the United States Troops for and in behalf of the government, promise, that if the foregoing conditions are fully complied with, No War shall be made upon the Coeur d'Alene Nation; and further that the men who are to be surrendered, whether those who commenced the fight with Lt. Col. Steptoe, or as hostages for the future good conduct of the Coeur d'Alene Nation, shall in no wise be injured, and shall within one year from the date hereof, be restored to their Nation.

Art. 6′ It is agreed by both of the aforesaid contracting parties, that, when the foregoing Articles shall have been fully complied with, a permanent Treaty of Peace and Friendship shall be made.

Art. 7′ It is agreed by the chiefs and head Men of the Coeur d'Alene Nation, that this treaty of peace and friendship shall extend also to include the Nez Perce Nation of Indians.

Done at the Headquarters of the
Expedition against Northern
Indians

At the Coeur d'Alene Mission,
Washington Territory
This seventeenth day of
September Eighteen hundred and
fifty eight.
G. Wright
Col. 9th Infy
Command, U.S. Troops

APPENDIX 2

Annual Report (1873) of the Commissioner of Indian Affairs (excerpted from 43rd Cong., 1st Sess. House Exec. Doc. No. 1, Vol. 4)

REPORT
of the
COMMISSIONER OF INDIAN AFFAIRS.

DEPARTMENT OF THE INTERIOR,
OFFICE OF INDIAN AFFAIRS,
November 1, 1873.

I have the honor, in accordance with law, to forward herewith the annual report of Indian affairs of the country.

* * *

[p. 385]

COEUR D'ALENES.

The commission appointed to visit certain Bannock Tribes, near Fort Hall, Idaho, were directed, under instructions from this office of the 1st of July last, to visit the Coeur d'Alene Indians to hear complaints, with a view to their cure or removal, and to induce them to abandon a roving life and to consent to confine themselves to a reservation. They succeeded in having a council with these Indians, and as a result of their negotiations, the Indians agreed to go upon a reservation which was, at the time, described to them, and which has since been set apart temporarily by the President until legislation can be had thereon by Congress. For further

particulars attention is invited to article entitled "Legislation recommended."

* * *

[p. 391]

LEGISLATION RECOMMENDED.

---

* * *

[p. 392]

AGREEMENT WITH COEUR D'ALENE INDIANS IN IDAHO.

In 1867 an Executive Order was issued setting apart a reservation for the Coeur d'Alenes, but, being dissatisfied with the location, they never located thereon, and continued to roam over the tract of country claimed by them. For the purpose of extinguishing their claim to all the tract of country claimed by them, and of locating them on a reservation suitable to their wants as an agricultural people, an agreement has been made with them by Hon. J.P.C. Shanks, Gov. Bennett, of Idaho, and Agent J.B. Montieth, subject to ratification by Congress, which is respectfully recommended. Pending such action by that body, I have deemed it prudent to have set apart by executive order the tract of country described in said agreement as a reservation for said Indians, in order that white persons may be prohibited from settling thereon and claiming compensation for improvements from the Government.

APPENDIX 3

Index to the Executive Documents of the House of Representatives for the Third Session of the Forty-fifth Congress, 1878-'79

---

* * *

[p.266-267]

Executive Mansion, *November 8, 1873.*

It is hereby ordered that the following tract of country in the Territory of Idaho be, and the same is hereby, withdrawn from sale and set apart as a reservation for the Coeur d'Alene Indians, in said Territory, viz:

"Beginning at a point on the top of the dividing ridge between Pine and Latah (or Hangman's) creeks, directly south of a point on said last-named creek, six miles above the point where the trail from Lewiston to Spokane bridge crosses said creek; thence in a northeasterly direction in a direct line to the Coeur d'Alene Mission, on the Coeur d'Alene River (but not to include the lands of said mission); thence in a westerly direction, in a direct line, to the point where the Spokane River heads in, or leaves the Coeur d'Alene Lakes; thence down along the center of the channel of said Spokane River to the dividing line between the Territories of Idaho and Washington, as established by the act of Congress organizing a territorial government for the Territory of Idaho; thence south along said dividing line to the top of the dividing ridge between Pine and Latah (or Hangman's) Creek; thence along the top of the said ridge to the place of beginning."

U.S. GRANT

APPENDIX 4

Statutes at Large From Dec. 1885 To March 1887, Vol. XXIV FORTY-NINTH CONGRESS. SESS. I. CH. 333

[1886]

* * *

[p.29]

CHAP. 333. – An act making appropriations for the current and contingent expenses of the Indian Department, and for fulfilling treaty stipulations with various Indian tribes, for the year ending June thirtieth, eighteen hundred and eighty-seven and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the following sums be, and they are hereby, appropriated, out of any money in the Treasury not otherwise appropriated, for the purpose of paying the current and contingent expenses of the Indian Department for the year ending June thirtieth, eighteen hundred and eighty-seven, and fulfilling treaty stipulations with the various Indian tribes, namely:

* * *

At the Colville agency, at one thousand five hundred dollars;

* * *

[p.42]

GENERAL INCIDENTAL EXPENSES
OF THE INDIAN SERVICE.

* * *

[p.43]

Incidental expenses of Indian service in Washington Territory: For general incidental expenses of the Indian service, including traveling expenses of agents at seven agencies, and the support and civilization of Indians at Colville and Nisqually agencies, and pay of employees, including a physician for Coeur d'Alene reservation, sixteen thousand dollars.

* * *

MISCELLANEOUS.

* * *

[p.44]

. . . [T]o enable said Secretary to negotiate with the Upper and Middle bands of Spokane Indians and Pend d'Oreilles Indians, in Washington and Idaho Territories, for their removal to the Colville, Jocko, or Coeur d'Alene reservations, with the consent of the Indians on said reservations; and also to enable said Secretary to negotiate with said Indians for the cession of their lands to the United States; and also to enable said Secretary to negotiate with the Coeur d'Alene Indians for the cession of their lands outside the limits of the present Coeur d'Alene reservation to the United States, fifteen thousand dollars, or so much thereof as may be necessary, to be immediately available; but no agreement made shall take effect until ratified by Congress.

* * *

APPENDIX 5

House of Representatives 50th Congress, 1st Session, Ex. Doc. No. 63 Excerpts from pp. 2, 3, 9

REDUCTION OF INDIAN RESERVATIONS

MESSAGE
FROM THE
PRESIDENT OF THE UNITED STATES,
TRANSMITTING

A communication from the Secretary of the Interior, with accompanying papers, relating to the reduction of Indian reservations.

January 9, 1888. – Referred to the Committee on Indian Affairs and ordered to be printed.

To the Senate and House of Representatives:

I transmit herewith a communication of 30th December, 1887, from the Secretary of the Interior, submitting, with accompanying papers, two additional reports from the Commission appointed to conduct negotiations with certain tribes and bands of Indians for reduction of

reservations, etc. under the provisions of the act of May 15, 1886 (24 Stats., 44), providing therefor.

GROVER CLEVELAND.

EXECUTIVE MANSION
January 9, 1888.

DEPARTMENT OF THE INTERIOR
Washington, December 30, 1887

The PRESIDENT:

Under the respective dates of January 11 and February 17, 1887, I had the honor to submit to you for transmittal to Congress two separate reports received by this Department through the Commissioner of Indian Affairs from the Commission commonly known as the Northwest Indian Commission, appointed under the provisions of the act of May 15, 1886, to negotiate with certain Indian tribes in Minnesota and the Northwest Territories (24 Stats.,44).

* * *

[p. 2]

I now have the honor to submit herewith two additional reports made by the said commission, with the accompanying letter of the Commissioner of Indian Affairs forwarding them to the Department, with five agreements made with various tribes and bands of Indians in the Northwest, viz: The Gros Ventre, Piegan, Blood, Blackfeet, and River Crow Indians upon the reservation commonly known as the Great Blackfeet Reservation in northern Montana; the Upper and Middle bands

of Spokane Indians; the Coeur d'Alene Indians; the Pend d'Oreille or Calispel Indians; the Indians upon the Jocko Reservation in Montana.

* * *

The five agreements now presented, together with the three heretofore reported, complete the work of negotiation so far as it could be accomplished by the Department with the tribes and bands of Indians for which provision was made in the act of May 15, 1886.

The Commissioner of Indian Affairs in his report, herewith, reviews at some length the provisions of each of the accompanying agreements, which may be briefly though very generally summarized, as follows:

* * *

* * *

The Coeur d'Alene Indians, in the agreement made with them, relinquish to the United States, for the consideration of $150,000, to be expended for their benefit, etc., all right, title, and interest they now have or ever possessed to and in any lands outside the limits of their present reservation in the Territory of Idaho; they also agree to the removal to and settlement upon their reservation of the Upper and Middle bands of Spokane Indians, the Calispels (Pend d'Oreilles) now residing in the Calispel Valley, and to any other bands of non-reservation Indians belonging to the Colville Agency, Washington Territory, etc.

* * *

[p. 3]

The law under which these negotiations have been conducted provides that "no agreement shall take effect until ratified by Congress."

The Commissioner of Indian Affairs in his report herewith expresses the opinion that these agreements are just and favorable alike to the Government and to the Indians. He recommends their speedy ratification, and submits estimates of the various amounts required to be appropriated at this time by Congress to carry out the terms of the negotiations, which will be found on the concluding pages of his report.

By these negotiations a very large area of land now in state of reservation for Indian purposes, being the excess of quantity needed for the actual use of the tribes and bands for whom it has been held in reservation, is placed at the disposal of the United States so that it may be opened to settlement in such manner as Congress in its wisdom may direct; and further, the adjustment of claims asserted by Indians to large portions of land in Washington and Idaho Territories, now largely occupied by settlers, is provided for. When these negotiations shall have been fully ratified they will remove some serious hindrances to the contentment, the permanent settlement, and the more rapid advancement in civilization of the tribes and bands who are parties thereto. The money necessary to be appropriated for their support and to assist them forward in the ways of civilization will not be, as heretofore, so largely a gratuity from the Government, but will go to them by judicious expenditures as

consideration for valuable rights and claims which they have ceded and relinquished to the Government.

For these and other like reasons I concur in the recommendation of the Commissioner that the agreements be speedily ratified.

I have the honor to be, very respectfully, your obedient servant.

L.Q.C. LAMAR,
Secretary.

DEPARTMENT OF THE INTERIOR,
OFFICE OF INDIAN AFFAIRS,
Washington, December 13, 1887.

SIR: . . . I now have the honor to transmit herewith duplicate copies of two additional reports of said Commission and accompanying agreements (five in all) made with the several tribes in northern Montana, occupying the Gros Ventre, Piegan, Blood, Blackfeet and Crow River Reservation, commonly known as the Great Blackfeet Reservation, and the Upper and Middle bands of Spokane Indians, the Pend d'Oreilles, or Calispels, and the Coeur d'Alenes in Idaho, and the Flathead, Pend d'Oreille and Kootenai Indians of the Flathead Reservation in Montana. These reports are dated, respectively, February 11 and June 29, 1887.

The Commissioners report that many of the Indians are anxious to remove at once to their new homes, and they strongly urge the speedy ratification of the agreement.

[p. 9]

AGREEMENT WITH THE COEUR D'ALENE INDIANS.

These Indians also lay claim to a large tract of country in Washington, Idaho, and Montana Territories, by right of original occupancy, and, as we have seen, the act authorized negotiations with them "for the cession of their lands outside the limits of the present Coeur d'Alene Reservation to the United States."

By the terms of the agreement made with them, the Indians cede and relinquish to the United States all right, title, and interest they now have or ever possessed in any lands outside the limits of their present reservation.

They also agree to the removal and settlement upon their reservation of the Upper and Middle bands of Spokane Indians, upon the terms and conditions agreed upon with said Spokane Indians, and also to the removal and settlement there of the Calispels (Pend d'Oreilles) now residing in the Calispel Valley, and any other band of non-reservation Indians belonging to the Colville Agency, upon terms agreed upon with any such bands.

In consideration of the foregoing, it was agreed that the Coeur d'Alene Reservation shall be forever held as Indian lands, for the home of the Coeur d'Alene and other bands settled there under said agreements, and that it shall never be sold or otherwise disposed of without their consent.

It is further agreed that the United States shall expend the sum of $150,000 for the benefit of the Coeur d'Alene Indians; $30,000 the first year and $8,000 per annum for fifteen years thereafter, in providing them

with a steam saw and grist mill, in the employment of an engineer and miller, and in the purchase of such useful articles as shall best promote their civilization, education, and comfort, and, under certain stipulated conditions, cash payments may be made to them. In addition to this, it is agreed that the United States shall employ, at its own expense, a competent physician, blacksmith, and carpenter, and supply medicines for said Coeur d'Alene Indians.

There are some other provisions intended to protect the morals and improve the condition of said Indians, but the foregoing are the principal features of the agreement.

The Commissioners give an interesting account of the Coeur d'Alene Indians, and commend them in the highest terms for industry, thrift, and sobriety. They speak of them as polite in a marked degree and exceedingly good-natured. They wear short hair, dress like the whites, and emulate them in everything save their vices. They live in comfortable houses, many of them having two – one on the farm and another in the village – cultivate the soil extensively, are loyal to the Government, respectful of the laws, devoted to their religion, and in short a better ordered or behaved community of Indians can nowhere be found. Such is the testimony of the Commissioners.

APPENDIX 6

Senate
50th Congress, 1st Session, Ex. Doc. No. 76
pp. 1-7

LETTER
FROM
THE SECRETARY OF THE INTERIOR,
Transmitting,

In response to Senate resolution of January 25, 1888, information about the Coeur d'Alene Indian Reservation, in Idaho.

February 13, 1888 – Ordered to be printed, and referred to the Committee on Indian Affairs.

DEPARTMENT OF THE INTERIOR
Washington, February 9, 1888.

SIR: I have the honor to acknowledge the receipt by the Department on the 26th day of January last, of a resolution of the Senate, adopted upon the 25th of January, 1888, which, omitting the preamble thereto, is in the following words:

Resolved, That the Secretary of the Interior be, and he is hereby, directed to inform the Senate as to the extent of the present area and boundaries of the Coeur d'Alene Indian Reservation in the Territory of Idaho: whether such area includes any portion, and if so about how much, of the navigable waters of Lake Coeur d'Alene and of Coeur d'Alene and St. Joseph Rivers; about what proportion of said reservation is agricultural, grazing, and mineral lands, respectively; also the number of Indians occupying such reservation; also on what portion of said reservation the Indians now thereon are located; also

whether, in the opinion of the Secretary, it is advisable to throw any portion of such reservation open to occupation and settlement under the mineral laws of the United States, and, if so, precisely what portion; and also whether it is advisable to release any of the navigable waters aforesaid from the limits of such reservation.

In response thereto I transmit herewith a communication, under date of the 7th instant, from the Commissioner of Indian Affairs, to whom the resolution was referred to report the facts required to properly meet the inquiries therein contained. This report states that the Coeur d'Alene Reservation, in the Territory of Idaho, embraces an area of 598,500 acres – 935 square miles; that it is situated in the northern portion of the Territory, between the 47th and 48th parallels of north latitude, and presents as an exhibit a map showing the outline boundaries of the reservation. It describes the portions of the navigable waters of Lake Coeur d'Alene and of the Coeur d'Alene River which traverses the reservation, and states the absence of information necessary to show how much of the St. Joseph River, which flows through the reservation, is navigable, or whether it is navigable at all.

The Commissioner also reports that as but a small portion of the reservation has been surveyed (less than three townships), he is unable to furnish more than a rough estimate of the character of the lands embraced therein, which is that at least one third of its entire area is agricultural, one-third mountain and timber, and the remainder hilly and probably suitable for pasturage; that east of the lake and north of the Coeur d'Alene River the lands are described as "all mountains," and along the north line of the reservation, also east of the lake, are

lands described as mineral lands. He also reports the number of Indians upon the reservation, as per last census, to be 487, nearly all of whom he believes live on that portion of the reservation lying south of the Lake Coeur d'Alene and St. Joseph River, and not far away from the Old Mission on Hangman's Creek.

The Commissioner further states that, in his opinion, the reservation might be materially diminished without detriment to the Indians, and that changes could be made in the boundaries for the release of some or all of the navigable waters therefrom which would be of very great benefit to the public; but this should be done, if done at all, with the full and free consent of the Indians, and they should, of course, receive proper compensation for any lands so taken.

In connection with this matter the Commissioner refers to the negotiations lately authorized by Congress and concluded with these Indians for the cession of their lands outside the limits of the present Coeur d'Alene Reservation, as shown by agreement published in House Ex. Doc. No. 63, Fiftieth Congress, first session, pp. 53-56, under the provisions of which arrangement has been made for the removal to and settlement upon said reservation of sundry non-reservation Indians; and he reports as his opinion that when the present agreement shall have been ratified it will be an easy matter to negotiate with the Coeur d'Alenes for the cession of such portions of their reservation as they do not need, including all or a

portion of the navigable waters, upon fair and very reasonable terms.

I have the honor to be, very respectfully,

H.L. Muldrow,

Acting Secretary.

The PRESIDENT PRO TEMPORE OF THE SENATE.

DEPARTMENT OF THE INTERIOR,

OFFICE OF INDIAN AFFAIRS,

Washington, February 7, 1888.

SIR: I have the honor to acknowledge the receipt, by your reference the 26th ultimo for report, of a resolution of the Senate of the United States of January 25, 1888, as follows:

Whereas it is alleged that the present area of the Coeur d'Alene Indian Reservation, in the Territory of Idaho, embraces 480,000 acres of land; that there are, according to the statistics in the Indian Bureau, only about 476 Indians in the tribe now occupying such reservation, or more than 1,000 acres to each man, woman and child; that Lake Coeur d'Alene, all the navigable waters of Coeur d'Alene River, and about 20 miles of the navigable part of St. Joseph River, and part of St.Mary's, a navigable tributary of the St. Joseph, are embraced within this reservation, except a shore-line of about 3 1/2 miles at the north end of the lake, it being alleged that this lake and its rivers tributary constitute the most important highways of commerce in the Territory of Idaho, and are in fact the only navigable waters except Snake River, now used for steam-boat navigation, in the Territory; that all boats now entering such waters are subject to the laws governing the Indian country, and all persons going on

such lake or waters within the reservation lines are trespassers; and

Whereas it is further alleged that the Indians now on such reservation are located in the extreme southwest corner of the same, around DeSmedt (sic) Mission, near the town of Farmington, in Washington Territory, where the land is good for agriculture; and it being further alleged that all that part of such reservation lying between Lake Coeur d'Alene and Coeur d'Alene River and that part between the Coeur d'Alene River and St. Joseph River is a territory rich in the precious metals and at the same time being of no real use or benefit to the Indians:

Therefore,

Resolved, That the Secretary of the Interior be, and he is hereby, directed to inform the Senate as to the extent of the present area and boundaries of the Coeur d'Alene Indian Reservation in the Territory of Idaho; whether such area includes any portion, and, if so, about how much of the navigable waters of Lake Coeur d'Alene, and of Coeur d'Alene and St. Joseph Rivers; about what proportion of said reservation is agricultural, grazing, and mineral land, respectively; also the number of Indians occupying said reservation; also on what portion of such reservation the Indians now thereon are located; also whether, in the opinion of the Secretary, it is advisable to throw any portion of such reservation open to occupation and settlement under the mineral laws of the United States, and, if so, precisely what portion; and also whether it is advisable to release any of the navigable waters aforesaid from the limit of such reservation.

Agreeably with the directions contained in said resolution I have the honor to state:

(1) The Coeur d'Alene Reservation, in the Territory of Idaho, embraces an area of 598,500 acres, or 935 square miles.

It lies in the northern portion of said Territory, between the forty-seventh and forty-eighth parallels of north latitude, and has for its western boundary the dividing line between Idaho and Washington Territories.

It is somewhat in the shape of a scalene triangle with one of its points cut off, its longest side (east boundary line) being about 42 miles, and its shortest (north boundary line) about 35 miles long. The west line is about 39 miles long.

From the official map of Idaho (1883) and sundry others examined, the reservation appears to embrace all the navigable waters of Lake Coeur d'Alene, except a very small fragment cut off by the north boundary of the reservation which runs "in a direct line" from the Coeur d'Alene Mission to the head of Spokane River.

This lake is about 35 miles long and from 2 to 5 miles wide.

The Coeur d'Alene River traverses the reservation for a distance of about 25 miles, entering the reservation from the east and emptying into Lake Coeur d'Alene.

The St. Joseph River also flows through the reservation, entering from the east and finding its outlet in said lake.

The Coeur d'Alene River is navigable in its entire course through the reservation, and steamers ply from the head of the lake to the mouth of the river, and thence up the river to the Old Mission on the east line of the reservation, a river passage of about 25 miles. How much farther the river is navigable toward its source and beyond the limits of the reservation I have no means of knowing.

I am unable to furnish any information as to how much of the St. Joseph's River is navigable, or whether indeed it is navigable at all. From the maps it would appear to be quite as large as the Coeur d'Alene River.

As to what proportion of the reservation is agricultural, grazing, and mineral land, respectively, I have to state that as but a very small portion (less than three townships) of the reservation has been surveyed. I am unable to furnish any thing more than a rough estimate of the areas of the several classes referred to. From a rude sketch of the reservation prepared by the farmer in charge, with a view to showing as nearly as possible the character of the lands embraced within the reservation, I should judge that a least one-third of the entire area of the reservation is agricultural, one-third mountain and timber, and the remainder hilly and probably suitable for pasturage.

I inclose a copy of the map or sketch, and invite especial attention to it as giving the most satisfactory information obtainable from the records of this office. It is drawn upon a scale of 2 miles to the inch.

It will be observed that the lands in the extreme northern portion of the reserve, west of the lake, for a

distance of 10 or 12 miles south, are described as "timbered lands on mountains, with small valleys of pasture lands." From thence south to the hills south of the Farmington Landing road they are set down either as first or second class "agricultural lands," and so of all the lands lying directly south of the lake until the "hill-land" is reached. Then south of the hilly lands, extending along the entire course of Hangman's Creek, is a wide strip described as "agricultural lands, first class."

East of the lake and north of the Coeur d'Alene River the lands are described as "all mountains," and along the north line of the reservation, also east of the lake, are lands described as "mineral lands."

A strip one-half mile wide on both sides of the Coeur d'Alene River along its entire length is described as "fertile valley, overflowed every spring."

South of the Farmington road and along the entire east line of the reservation is a broad strip varying from 2 to 8 miles wide, described as "all hill-land; is timbered, and soil third rate, in places rocky."

The west side of Coeur d'Alene Lake appears to be skirted all along with timbered mountains or hills.

A map accompanying the report of an inspection made in 1886 by Lieut. Col. H.M. Lazelle, Twenty-third Infantry, acting inspector-general, Department of the Columbia, with reference to the sale of liquor upon the steamer *Coeur d'Alene* within the navigable waters of the reservation, will be found valuable, as showing the location of the neighboring towns and mines with reference to the reservation, the steamboat route through Lake

Coeur d'Alene, and the Coeur d'Alene River, the wagon roads and trails entering and crossing the reservation, mountain ranges, railroads, etc., and I have thought best to have a copy of said map made to accompany this report.

It might be proper to state here that Inspector Gardner, who visited the Coeur d'Alene Reservation in September of last year, places a much smaller estimate upon the quantity of agricultural land within the reservation than the farmer's map would indicate, but he could hardly be expected to have as perfect a knowledge of the reservation as the resident farmer in charge.

Inspector Gardner says:

The land embraced in the Coeur d'Alene Reserve, 598,500 acres, is in Idaho Territory. It is rough and very mountainous, and not more than 50,000 or 60,000 acres susceptible of profitable cultivation. A large portion of the Reservation is heavily timbered.

The number of Indians occupying the reservation as per last census, taken June 30, 1887, is 487. I believe all, or nearly all, live on that portion of the reservation lying south of the Lake Coeur d'Alene and St. Joseph River, and not far from the Old Mission on Hangman's Creek.

The question which remains to be answered is, whether it is advisable to throw any portion of the said reservation open to occupation and settlement under the mineral laws of the United States and, if so, precisely what portion, and whether it is desirable to release any of the navigable waters mentioned in the resolution from the limits of said reservation.

In approaching this question, I deem it proper to refer briefly to the character and condition of the Indians occupying the reservation and the situation of affairs as existing amongst them.

There are few Indians in the entire country, if we except the five civilized tribes, who are as far advanced, and even they need not be excepted in any comparison either of their virtues, habits of industry, loyalty, or ambition to attain a higher stage of civilization.

They cultivate the soil extensively, live in comfortable houses, dress like the whites do, wear short hair, and in all other respects live and do as white people do. Their houses are painted inside and outside, their barns are well built and commodious, and they have all the improved farm implements and machinery. They own large bands of cattle and horses and an abundance of hogs and poultry.

The Northwest Indian Commission, in the report of its recent visit to these Indians, said:

Each one has a comfortable house on his farm, and nearly all have equally comfortable houses at the mission, which together make quite a village. They remain on their farms during the week days, and on the Sabbath repair to their dwellings at the village to attend religious services and see their children who are at the Mission schools. Long experience in self-reliance and traffic with the neighboring whites has made them cautious, shrewd, and provident in the use of money. We learned that their trade in one town adjacent to the reservation'amounts to about $25,000 yearly. A better and better behaved Indian community can nowhere be found.

Furthermore, the Coeur d'Alene Indians have been for many years the firm friends of the whites. A notable instance of this was the part they took in the memorable Nez Perce outbreak of 1878. They not only shielded and protected the whites in that disastrous war to the fullest extent of their power, but guarded their property at the peril of their own lives, when a large portion of the white population had fled the country for safety.

When peace was restored the people acknowledged their good services and thanked them in formal terms, promising also to assist them in obtaining permanent title to their homes.

I have said this much in order to show that the Coeur d'Alene Indians are quite intelligent and fully capable of understanding their relations to their white neighbors, and that they would be likely to take a sensible view of any proposition for a change of the boundaries of their reservation which public necessity or convenience would seem to require, and at the same time to show that they are deserving of fair and honest treatment from the whites.

The one thing that has given them trouble has been the fear of losing their homes. They have watched the progress of white settlement in the surrounding country, the discovery of valuable mines, the building of railroads, etc., and all this has made them apprehensive lest in some way their reservation might be wrested from them.

In 1884 their agent reported as follows:

The rapid progress they are making, and the great interest manifested by them in their farm work, in their

fences, cultivation, in improving the breed of their horses and cattle, and in fact in all things, is commendable.

It was feared in the early spring that the great rush to the Coeur d'Alene gold mines would cause considerable trespassing upon their reserve, but happily so many other routes were opened to them that there were but few crossing the reserve, and now it has nearly ceased.

And again in 1885:

The Coeur d'Alenes on the Coeur d'Alene Reserve in Idaho are flourishing in the highest degree, being wholly independent of the Government, save in the support of their schools and the instruction they receive from their farmer. What they most dread is that their lands will be taken from them some day by the whites, or they be forced to take up small allotments, while now many of them have large fields inclosed with post and board fences, or good substantial rails. Some half-dozen of them have 200 acres of land under cultivation.

And in 1886:

There has been much talk of late by the whites of having their reserve thrown open to settlement, which has troubled Saltice, their chief, very much. He, however, felt somewhat satisfied when I assured him that if such steps were taken by the Government he and his people would receive their land in severalty before the whites would be permitted to enter.

I have taken some pains to ascertain, by reference to the correspondence and otherwise, whether the Indians, would be likely to consent to a reasonable reduction of their reservation, and I am satisfied that they would upon anything like just and reasonable terms, and my own opinion is that the reservation might be materially diminished without detriment to the Indians, and that changes

could be made in the boundaries for the release of some or all of the navigable waters therefrom, which would be of very great benefit to the public; but this should be done, if done at all, with the full and free consent of the Indians, and they should, of course, receive proper compensation for any land so taken.

Just what portion of the reservation and navigable waters should be segregated from the reservation, I am unable to say. That, I think, should be determined by negotiations with the Indians.

As bearing upon the subject of the inquiries presented in the Senate resolution, I quote the following from the report of Inspector Gardner, already cited:

On the north and east side of the reserve (Coeur d'Alene) is a section of very mountainous country, known as "Wolf Lodge district." The Indians do not use this, and only occasionally go there hunting for elk and deer. The mountains in this district are said to contain large quantities of valuable minerals. Already prospectors have made their appearance and are only deterred from developing same by occasional presence of the military, who would eject them, and the agent would cause their arrest for trespassing on an Indian reservation. For farming, grazing, or, in fact, for any purpose whatever, this mountain district is approximately valueless to the Coeur d'Alene Indians, but could be advantageously utilized by the whites in developing the mineral resources of same. And, in view of these facts, I see no reason why proper legislation should not be had authorizing the Indians to dispose of their title to same to the United States.

I also quote the following from a report by Special Agent G.W. Gordon, of this Bureau, who visited the

Coeur d'Alene Indians upon official business in August last:

There is great eagerness on the part of the whites to locate mining claims on the mineral portion of the reserve, and especially in that section known as "Wolf Lodge," and we found mining claims numerously staked off in that section and in some cases notices posted, though we did not find the parties themselves on the reserve. These mining prospectors are constantly on this portion of the reserve, and it seems next to impossible to keep them off with the means at hand. They are doing no injury, however, further than simply locating mining claims with a view to their possession when that part of the reserve is opened to settlement, as it seems to be believed by them it will be at an early day.

It may be proper to add that the special agent found the Indians decidedly opposed to taking their lands in severalty under the general allotment act. This may be accounted for in part, I think, by the fact that some of them have individually much more land under cultivation than they would be entitled to under that act, and they naturally desire to keep all they have.

Upon this subject the special agent says:

While on the reserve we held a general and well attended council of the Indians, in order to obtain their views in regard to taking their lands in severalty, and after a clear understanding as to what was desired by the Government, they decided by a unanimous vote adversely to taking in severalty otherwise than they now hold them. These Indians, as you are doubtless aware, are settled on farms of their own selection, are self-supporting and making gratifying progress in agriculture, while they have good schools and their children generally being educated.

In conclusion I will state that in my opinion these Indians have all the original Indian rights in the soil they occupy. They claimed the country long before the lines of the reservation were defined by the executive order of 1873, and the present reservation embraces only a portion of the lands to which they laid claim. This claim has been recognized in various ways and at sundry times, and the last Congress authorized the Secretary of the Interior to negotiate with them "for the cession of their lands outside the limits of the present Coeur d'Alene Reservation to the United States." Pursuant to that authority negotiations were conducted with them in March last and an agreement concluded, which is now before Congress for ratification. The agreement is published in House Ex. Doc. No. 63, Fiftieth Congress, first session, pp. 53-56.

It should be stated also that provision is made in said agreement for the removal and settlement upon the Coeur d'Alene Reservation of the Upper and Middle Bands of Spokane Indians, now residing in and around Spokane Falls in Washington Territory, and also the Calispels, now residing in the Calispel Valley, and any others of the non-reservation Indians belonging to the Colville Agency, and it is confidently hoped and expected that if the agreement is ratified and confirmed the Spokanes, numbering between 350 and 400 souls, will be removed and settled there.

However, there undoubtedly is an abundance of good farming land in the extreme southern portion of the reservation for all the Indians who will be likely to go there, and much to spare.

I think that when the present agreement shall have been ratified it will be an easy matter to negotiate with them for the cession of such portions of their reservation as they do not need, including all or a portion of the navigable waters, upon fair and very reasonable terms.

In addition to the two maps spoken of in this report, I transmit herewith a tracing of the official map of the survey of "so much of the outboundaries of the Coeur d'Alene Indian Reservation in Idaho as are not marked by prominent natural boundaries and by the surveyed line between Idaho and Washington Territories" as surveyed in 1883 by Darious F. Baker, United States deputy surveyor.

A copy of this report is herewith inclosed, and also the Senate resolution.

Very respectfully, your obedient servant,

J.D. C. Atkins,

Commissioner.

The SECRETARY OF THE INTERIOR.

APPENDIX 7

Statutes at Large
From Dec. 1887 to March 1889, Vol. XXV
FIFTIETH CONGRESS. SESS. I.

---

* * *

[1888]

[p.160]

CHAP. 336. – An act granting to the Washington and Idaho Railroad Company the right of way through the Coeur d'Alene Indian Reservation.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the right of way is hereby granted, as hereinafter set forth, to the Washington and Idaho Railroad Company, a corporation organized and existing under the laws of the Territory of Washington, for the extension of its railroad through the lands in Idaho Territory set apart for the use of the Coeur d'Alene Indians by executive order, commonly known as the Coeur d'Alene Indian Reservation, beginning at a point on the westerly line of said reservation near the junction of the Washington and Idaho Railroad with the Idaho Branch of said road, near Lone Pine, in Washington Territory, and running thence in a northerly direction across the Coeur d'Alene Indian Reservation to a point near the mouth of the Saint Joseph's River, on the Coeur d'Alene Lake, thence in a northeasterly direction along the east side of the Coeur d'Alene Lake to the Coeur d'Alene River, and thence in a generally easterly direction, by the Coeur d'Alene Mission, to the east line of the reservation.

SEC. 2. That the right of way hereby granted to said company shall be seventy-five feet in width on each side of the central line of said railroad as aforesaid; and said company shall also have the right to take from said lands adjacent to the line of said road material, stone, earth, and timber necessary for the construction of said railroad; also, ground adjacent to such right of way for station-buildings, depots, machine-shops, side-tracks, turnouts, and water-stations, not to exceed in amount three hundred feet in width and three thousand feet in length for each station, to the extent of one station for each ten miles of road.

SEC. 3. That it shall be the duty of the Secretary of the Interior to fix the amount of compensation to be paid the Indians for such right of way, and provide the time and manner for the payment thereof, and also to ascertain and fix the amount of compensation to be made individual members of the tribe for damages sustained by them by reason of the construction of said road; but no right of any kind shall vest in said railway company in or to any part of the right of way herein provided for until plats thereof, made upon actual survey for the definite location of such railroad, and including the points for station-buildings, depots, machine-shops, side-tracks, turnouts, and water-stations, shall be filed with and approved by the Secretary of the Interior, which approval shall be made in writing and be open for the inspection of any party interested therein, and until the compensation aforesaid has been fixed and paid; and the surveys, construction, and operation of such railroad, including charges of transportation, shall be conducted with due regard for the rights of the Indians, and in accordance

with such rules and regulations as the Secretary of the Interior may make to carry out this provision: *Provided*, That the consent of the Indians to said right of way shall be obtained by said railroad company in such manner as the Secretary of the Interior shall prescribed, before any right under this act shall accrue to said company.

SEC. 4. That said company shall not assign or transfer or mortgage this right of way for any purpose whatever until said road shall be completed: *Provided*, That the company may mortgage said franchise, together with the rolling-stock, for money to construct and complete said road: *And provided further*, The right granted herein shall be lost and forfeited by said company unless the road is constructed and in running order across said reservation within two years from the passage of this act.

SEC. 5. That said railway company shall accept this right of way upon the express condition, binding upon itself, its successors and assigns, that they will neither aid, advise, nor assist in any effort looking towards the changing or extinguishing the present tenure of the Indians in their land, and will not attempt to secure from the Indian tribes any further grant of land or its occupancy than is hereinbefore provided: *Provided*, That any violation of the condition mentioned in this section shall operate as a forfeiture of all the rights and privileges of said railway company under this act.

SEC. 6. That Congress may at any time amend, add to, alter, or repeal this act.

Received by the President, May 18, 1888.

[NOTE BY THE DEPARTMENT OF STATE. – The foregoing act having been presented to the President of the United States for his approval and not having been returned by him to the house of Congress in which it originated within the time prescribed by the Constitution of the United States, has become a law without his approval.]

APPENDIX 8

Statutes at Large
From Dec. 1887 to March 1889, Vol. XXV
FIFTIETH CONGRESS. SESS. II.

[1889]

* * *

[p. 980]

CHAP. 412. – An act making appropriations for the current and contingent expenses of the Indian Department, and for fulfilling treaty stipulations with various Indian tribes, for the year ending June thirtieth, eighteen hundred and ninety, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the following sums be, and they are hereby appropriated, out of any money in the Treasury not otherwise appropriated, for the purpose of paying the current and contingent expenses of the Indian Department for the year ending June thirtieth, eighteen hundred and ninety, and fulfilling treaty stipulations with the various Indian tribes, namely:

* * *

[p. 996]

GENERAL INCIDENTAL EXPENSES OF
THE INDIAN SERVICE.

* * *

[p. 997]

Incidental expenses of Indian service in Washington Territory: For general incidental expenses of the Indian service, including traveling expenses of agents at seven agencies, and the support and civilization of Indians at Colville and Nisqually Agencies, and pay of employees, including a physician for Coeur d'Alene Reservation, sixteen thousand dollars.

* * *

[p. 997]

MISCELLANEOUS.

* * *

[p. 1002]

SEC. 4. That the Secretary of the Interior be, and he is hereby, authorized and directed to negotiate with the Coeur d'Alene tribe of Indians for the purchase and release by said tribe of such portions of its reservation not agricultural and valuable chiefly for minerals and timber as such tribe shall consent to sell on such terms and conditions as shall be considered just and equitable between the United States and said tribe of Indians, which purchase shall not be complete until ratified by Congress and for the purpose of such negotiation, the sum of two thousand dollars, or so much thereof as may be necessary, is hereby appropriated out of any money in the Treasury not otherwise appropriated; the action of the Secretary of the Interior hereunder to be reported to Congress at the earliest practicable time.

* * *

APPENDIX 9

Annual Report (1890) of the Commissioner of Indian Affairs

REPORT
of
THE COMMISSIONER OF INDIAN AFFAIRS.
45300

DEPARTMENT OF THE INTERIOR,
OFFICE OF INDIAN AFFAIRS,
Washington, September 5, 1890.

The SECRETARY OF THE INTERIOR:

SIR: I have the honor to submit the fifty-ninth annual report of the Commissioner of Indian Affairs.

IN GENERAL

* * *

TITLE TO EXISTING INDIAN RESERVATIONS.

The Indian title has been extinguished to all the public domain, except Alaska, and the portion included in one hundred and sixty-two Indian reservations, not embracing those in New York already referred to nor that occupied by the Cherokees in North Carolina, and by the Sacs and Foxes in Iowa, both of which were acquired by purchase.

Of these one hundred and sixty-two reservations there were established –

By executive order	56
By executive order under authority of act of Congress	6
By act of Congress	28

By treaty, with boundaries defined or enlarged by executive order	15
By treaty or agreement and act of Congress	5
By unratified treaty	1
By treaty or agreement	51
Total	162

Reservations by Executive Order. – Of the fifty-six established by executive order, the title has not been held to be permanent, but the land has been subject to restoration to the public domain at the pleasure of the President. Under the general allotment act, however, of 1887 (24 Stats, p. 388) the tenure has been materially changed and all reservations, whether established by Executive order, act of Congress, or treaty, are held to be permanent.

The permanency of this tenure is further shown by the act of Congress authorizing and directing the Secretary of the Interior to negotiate with the Coeur d'Alene tribe of Indians in Idaho for the purchase and release of a portion of their reservation, which was established by executive order, (see Indian appropriation act. 1889, 25 Stats. p. 1002); also by the act ratifying agreement of May 14, 1880, whereby the Shoshone, Bannack, and Sheepeater Indians of the Lemhi Indian Reservation surrender for a valuable consideration that executive order reserve.

APPENDIX 10

Statutes At Large
From Dec. 1889 to March 1891, Vol. XXVI
FIFTY-FIRST CONGRESS SESS. II.

[1891]

---

* * *

[pp. 1026-1032]

SEC. 19. The following agreement entered into on the part of the United States by John V. Wright, Jared W. Daniels and Henry W. Andrews, Commissioners with the Coeur d'Alene Indians in Idaho Territory signed on the part of said Indians by Chief Andrew Seltice, and others which bears date March twenty-sixth, eighteen hundred and eighty-seven, and now on file in the Interior Department, is hereby accepted, ratified, and confirmed and is in the following words, to-wit:

AGREEMENT WITH COEUR D'ALENE.

This agreement made pursuant to an item in the act of Congress entitled "An act making appropriations for the current and contingent expenses of the Indian Department and for fulfilling treaty stipulations with various Indian tribes for the year ending June thirtieth, eighteen hundred and eight-seven, and for other purposes," approved May fifteenth, eighteen hundred and eighty-six, by John V. Wright, Jared W. Daniels, and Henry W. Andrews, duly appointed commissioners on the part of the United States and the Coeur d'Alene tribe of Indians now residing on the Coeur d'Alene Reservation, in the

Territory of Idaho, by their chiefs, headmen, and other male adults, whose names are hereunto subscribed, they being duly authorized to act in the premises, witnesseth:

ARTICLE 1.

Whereas said Coeur d'Alene Indians were formerly possessed of a large and valuable tract of land lying in the Territories of Washington, Idaho, and Montana, and whereas said Indians have never ceded the same to the United States, but the same, with the exception of the present Coeur d'Alene Reservation, is held by the United States and settlers and owners deriving title from the United States, and whereas said Indians have received no compensation for said land from the United States: Therefore,

ARTICLE 2.

For the consideration hereinafter stated the said Coeur d'Alene Indians hereby cede, grant, relinquish, and quitclaim to the United States all right, title, and claim which they now have, or ever had, to all lands in said Territories and elsewhere, except the portion of land within the boundaries of their present reservation in the Territory of Idaho, known as the Coeur d'Alene Reservation.

ARTICLE 3.

The said Coeur d'Alene Indians agree and consent that the Upper and Middle bands of Spokane Indians residing in and around Spokane Falls, in the Territory of

Washington, may be removed to the Coeur d'Alene Reservation and settled thereon in permanent homes on the terms and conditions contained in an agreement made and entered into by and between John V. Wright, Jared W. Daniels, and Henry W. Andrews, commissioners on the part of the United States and said Spokane Indians, concluded on the fifteenth day of March, eighteen hundred and eighty-seven, at Spokane Falls, in the Territory of Washington.

ARTICLE 4.

And it is further agreed that the tribe or band of Indians known as Calespels, now residing in the Calespel Valley, Washington Territory, and any other bands of non-reservation Indians now belonging to the Colville Indian Agency, may be removed to the Coeur d'Alene Reservation by the United States, on such terms as may be mutually agreed on by the United States and any such tribes or bands.

ARTICLE 5.

In consideration of the foregoing cession and agreements, it is agreed that the Coeur d'Alene Reservation shall be held forever as Indian land and as homes for the Coeur d'Alene Indians, now residing on said reservation, and the Spokane or other Indians who may be removed to said reservation under this agreement, and their posterity: and no part of said reservation shall ever be sold, occupied, open to white settlement, or otherwise disposed of without the consent of the Indians residing on said reservation.

ARTICLE 6.

And it is further agreed that the United States will expend for the benefit of said Coeur d'Alene Indians the sum of one hundred and fifty thousand dollars, to be expended under the direction of the Secretary of the Interior, as follows: For the first year, thirty thousand dollars, and for each succeeding year for fifteen years, eight thousand dollars. As soon as possible after the ratification of this agreement by Congress, there shall be erected on said reservation a saw and grist mill, to be operated by steam, and an engineer and miller employed, miller to be paid out of the funds herein provided. The remaining portion of said thirty thousand dollars, if any, and the other annual payments shall be expended in the purchase of such useful and necessary articles as shall best promote the progress, comfort, improvement, education, and civilization of said Coeur d'Alene Indians, parties hereto.

ARTICLE 7.

It is further agreed that if it shall appear to the satisfaction of the Secretary of the Interior that in any year in which payments are to be made as herein provided said Coeur d'Alene Indians are supplied with such useful and necessary articles and do not need the same, and that they will judiciously use the money, then said payment shall be made to them in cash.

ARTICLE 8.

It is further agreed that any money which shall not be used in the purchase of such necessary articles or paid over, as provided in article seven, shall be placed in the Treasury of the United States to the credit of the said Coeur d'Alene Indians, parties hereto, and expended for their benefit, or paid over to them, as provided in the foregoing articles.

ARTICLE 9.

It is further agreed that in the purchase for distribution of said articles for the benefit of said Indians the wishes of said Indians shall be consulted as to what useful articles they may need, or whether they need nay at all, and their wishes shall govern as far as it is just and proper.

ARTICLE 10.

It is further agreed that in the employment of engineers, millers, mechanics, and laborers of every kind, preference shall be given in all cases to Indians, parties hereto, qualified to perform the work and labor, and it shall be the duty of all millers, engineers, and mechanics to teach all Indians placed under their charge their trades and vocations.

ARTICLE 11.

It is further agreed that in addition to the amount heretofore provided for the benefit of said Coeur d'Alene Indians the United States, at its own expense, will furnish

and employ for the benefit of said Indians on said reservation a competent physician, medicines, a blacksmith, and carpenter.

ARTICLE 12.

In order to protect the morals and property of the Indians, parties hereto, no female of the Coeur d'Alene tribe shall be allowed to marry any white man unless, before said marriage is solemnized, said white man shall give such evidence of his character for morality and industry as shall satisfy the agent in charge, the minister in charge, and the chief of the tribe that he is a fit person to reside among the Indians; and it is further agreed that Stephen E. Liberty, Joseph Peavy, Patrick Nixon, and Julien Boutelier, white men who have married Indian women and with their families reside on the Coeur d'Alene Reservation, are permitted to remain thereon, they being subject, however, to all laws, rules, and regulations of the Commissioner of Indian Affairs applicable to Indian reservations.

ARTICLE 13.

It is further agreed and understood that in consideration of the amount expended in buildings and other improvements on said Coeur d'Alene Reservation for religious and educational purposes by the De Smet Mission, and valuable services in the education and moral training of children on said reservation, and in consideration that the Indians, parties hereto, have donated for said purposes one section of land on which is situated the boys school, one section on which is situated the girl's

school, and one section of timbered land for use of the schools, that said De Smet Mission and its successors may continue to hold and use said three sections of land and the buildings and improvements thereon so long as the same shall be used by said De Smet Mission and its successors for religious and educational purposes.

ARTICLE 14.

This agreement shall not be binding on either party until ratified by Congress.

In testimony whereof the said John V. Wright, Jared W. Daniels, and Henry W. Andrews, on the part of the United States, and the chiefs, headmen, and other adult Indians, on the part of the Indians, parties hereto, have hereunto set their hands and affixed their seals.

Done at De Smet Mission on the Coeur d'Alene Reservation, in the Territory of Idaho, on this the twenty-sixth day of March, in the year of our Lord one thousand eight hundred and eighty-nine.

SEC. 20. That the following agreement entered into with the said Coeur d'Alene Indians by Benjamin Simpson, John H. Shupe, and Napoleon B. Humphrey, Commissioners on the part of the United States, signed by said Commissioners and by said Andrew Seltice, Chief, and others, on the part of said Indians, which agreement bears date September ninth, eighteen hundred and eighty-nine, and is now on file in the Interior Department, is hereby accepted, ratified, and confirmed, and is in the following words, to wit:

AGREEMENT.

This agreement, made pursuant to an item of an Act of Congress, namely; Section 4 of the Indian appropriation act, approved March two, eighteen hundred and eighty-nine, (25 Stat., 1002), by Benjamin Simpson, John H. Shupe, and Napoleon B. Humphrey, duly appointed commissioners on the part of the United States, parties of the first part, and the Coeur d'Alene tribe of Indians, now residing on the Coeur d'Alene Reservation in the Territory of Idaho, by their chiefs, headmen, and other male adults whose names are hereunto subscribed, parties of the second part witnesseth:

ARTICLE 1.

For the consideration hereinafter named the said Coeur d'Alene Indians hereby cede, grant, relinquish and quitclaim to the United States, all the right, title, and claim which they now have, or ever had, to the following-described portion of their reservation, to wit: Beginning at the northeast corner of the said reservation, thence running along the north boundary line north sixty-seven degrees twenty-nine minutes west to the head of the Spokane River; thence down the Spokane River to the northwest boundary corner of the said reservation; thence south along the Washington Territory line twelve miles; thence due east to the west shore of the Coeur d'Alene Lake; thence southerly along the west shore of said lake to a point due west of the mouth of the Coeur d'Alene River where it empties into the said lake; thence in a due east line until it intersects with the eastern boundary line of the said reservation; thence northerly

along the said east boundary line to the place of beginning.

ARTICLE 2.

And it is further agreed, in consideration of the above, that the United States will pay to the said Coeur d'Alene tribe of Indians the sum of five-hundred thousand dollars, the same to be paid to the said Coeur d'Alene tribe of Indians upon the completion of all the provisions of this agreement.

ARTICLE 3.

It is further agreed that the payment of money aforesaid shall be made to the said tribe of Indians pro rata or share and share alike for each and every member of the said tribe as recognized by said tribe now living on said reservation.

ARTICLE 4.

It is further agreed and understood that this agreement shall not be binding on either party until the former agreement now existing between the United States by the duly-appointed commissioners and the said Coeur d'Alene tribe of Indians, bearing date March twenty-sixth, eighteen hundred and eighty-seven, shall be duly ratified by Congress; and in the event of the ratification of the aforesaid agreement of March twenty-sixth, eighteen hundred and eighty-seven, then this agreement to be and remain in full force and effect but not binding on either party until ratified by Congress. In witness

whereof the said Benjamin Simpson, John H. Shupe, and Napoleon B. Humphrey, on the part of the United States, and the chiefs, headmen, and other adult male Indians, on the part of the Indians, parties hereto, have hereunto set their hands and affixed their seals.

Done at De Smet Mission, on the Coeur d'Alene Reservation, in the Territory of Idaho, this the 9th day of September, in the year of our Lord one thousand eight hundred and eighty-nine.

SEC. 21. That for the purpose of carrying into effect the provisions of said two agreements with said Coeur d'Alene Indians there are hereby appropriated, out of any moneys in the Treasury not otherwise appropriated, in the manner and for the purpose as hereinafter specifically stated the following sums, to wit: For the first installment of one hundred and fifty thousand dollars, as provided for in article six of the first of said agreements, thirty thousand dollars, to be expended for the building and erection on said Coeur d'Alene Indian Reservation of a saw and grist mill, to be operated by steam, and for the payment of the wages of the engineer and miller to be employed in said mill, respectively, the remaining portion of said thirty thousand dollars, if any, to be expended in the purchase of such useful and necessary articles as shall best promote the progress, comfort, improvement, education, and civilization of said Coeur d'Alene Indians, all of said articles to be purchased, and said engineer and miller to be employed as near as may be in strict conformity with articles nine and ten of the first of said agreements. And for the purpose of meeting the requirements of articles two and three of the second agreement aforesaid the sum of five hundred thousand dollars is hereby

appropriated, out of any moneys in the Treasury not otherwise appropriated, to be paid by the United States to the said Coeur d'Alene tribe of Indians upon their compliance with all the provisions of the said second agreement hereinbefore recited, the same to be paid to the said tribe of Indians pro rata, or share and share alike, for each and every member of the said tribe as recognized by said tribe now living on said reservation.

SECTION 22. That all lands so sold and released to the United States, as recited or described in both of said agreements, and not heretofore granted or reserved from entry or location, shall, on the passage of this act, be restored to the public domain, and shall be disposed of by the United States to actual settlers only, under the provisions of the homestead law, except section twenty-three hundred and one of the Revised Statutes of the United States, which shall not apply, and under the law relative to town sites or to locators or purchasers under the mineral laws of the United States: *Provided*, That each settler or purchaser under and in accordance with the provisions of said homestead act, shall pay to the United States, for the land so taken by him, in addition to the fees provided by law, and within five years from the date of the first original entry, the sum of one dollar and fifty cents per acre, one-half of which shall be paid within two years; but the rights of honorably discharged Union soldiers and sailors, as defined and described in sections twenty-three hundred and four and twenty-three hundred and five of the Revised Statutes of the United States shall not be abridged, except as to the said sum to be paid as aforesaid: *Provided further*, That the Secretary of the Interior shall cause to be surveyed for and patented to

Frederick Post, upon his making final proof of all thereof before the register and receiver of the proper United States land office, and to the satisfaction of the Commissioner of the General Land office and Secretary of the Interior, and paying therefor two dollars and fifty cents per acre and the cost of making such survey of such portion of said reservation as is recited in the agreement in word and figures as follows, to wit:

"Know all men by these presents that I, Andrew Seltice chief of the Coeur d'Alene Indians, did on the first day of June, A.D. eighteen hundred and seventy-one, with the consent of my people, when the country on both sides of the Spokane River belonged to me and my people, for a valuable consideration sell to Frederick Post the place now known as Post Falls, in Kootenai County, Idaho, to improve and use the same (water-power); said sale included all three of the river channels and islands, with enough land on the north and south shores for water-power and improvements; and have always protected the said Frederick Post, for eighteen years, in the rights there and then conveyed, and he has always done right with me and my people. We, the chiefs of the Coeur d'Alenes, have signed articles of agreement with the Government to sell the portion of the reservation joining Post Falls, in which we have excepted the above-prescribed rights, before conveyed to Frederick Post, and no Indian and no white man except Frederick Post have any rights on the above-described lands and river channels; the said Frederick Post has fulfilled all of his agreements with me and my people by improving the water-power and building mills at great expense, and I hereby authorize him to

build a house and take full possession of the above-described lands on the reservation side, so that when the treaty is confirmed he may have full possession and protection of the Government in the same.

"Given under my hand and seal this 16th day of Sept'r., A.D. 1889.

his
"ANDREW X SELTICE.
mark.

APPENDIX 11

1908 Annual Report of the Department of the Interior, Volume 1

---

* * *

[pp.92-93]

BIRD RESERVATIONS.

Since March 13, 1903, 16 reservations for the protection of native birds have been created by Executive order, on recommendation of the Department, after a careful consideration and presentation of each case by this Bureau. These reserves have been created in response to a widespread popular and economic demand, made not only by the students of wild-bird life but also by the farmer and the sportsman and by a numerous and scattered citizenship, which, in a broad sense, is interested in conserving the nation's resources. No reserve has been created without securing, first, a full knowledge of ornithological conditions, and second, determining the character of the lands and their availability for bird reservation purposes. As a rule these lands are unfitted for agricultural, commercial or defensive purposes, the exceptions being noted in the modified form of order issued.

For convenience the bird reserves may be placed in three general groups, viz, the Florida and Gulf coast reserves, the reserves in the Northern States and those in the Pacific coast States.

The first group embraces nine reservations: Pelican Island, Breton Islands, Passage Key, Indian Key, Tern

Islands, Shell Keys, East Timbalier Island, Mosquito Inlet, and Tortugas Keys, which are scattered along the Atlantic and Gulf coasts from the middle of eastern Florida to western Louisiana. Upon these reserves thousands of many species of water birds nest, among which are brown pelicans, gulls and terns, black skimmers, cormorants, herons, etc.; and the Breton Island reserve, in addition, is the winter home of myriads of edible wild ducks.

The second group embraces three reservations: Stump Lake in North Dakota, and Huron Islands and Siskiwit Islands in Lake Superior, Michigan. Upon the Michigan reserves thousands of gulls and terns, and in the North Dakota reserve Canada geese, wild ducks, white pelicans, gulls, terns, and shore birds breed.

The third group embraces four reservations: Three Arch Rocks, Flattery Rocks, Quillayute Needles, and Copalis Rocks, islands located off the coasts of Washington and Oregon. Upon the coast islands thousands of murres, cormorants, petrels, puffins, gullemots, oyster catchers, and other characteristic sea birds breed.

On the majority of the reserved sites extermination by plume and cold-storage hunters was being pushed to a successful conclusion up to the date of reservation, but an effective warden service has eliminated this danger, and is greatly assisting in the preservation of an avifauna necessary to the welfare of the people.

1909 Annual Report of the Department of the Interior

[pp.43-44]

BIRD RESERVES.

Reservations for the protection of native wild birds have been created by executive order, as follows:

Bird reserves created.

Name of Reservation	Date.	Location.	Acres.
Pelican Island	Mar. 14, 1903	East Florida coast	5.50
Breton Islands	Oct. 04, 1904	S.E. coast of Louisiana	Unknown
Stump Lake	Mar. 09, 1905	North Dakota	27.39
Huron Islands	Oct. 10, 1905	Lake Superior, Michigan	Unknown
Siskiwik Islands	do	do	Unknown
Passage Key	Oct. 10, 1905	Tampa Bay, Florida	88.37
Indian Key	Feb. 10, 1906	do	90.00
Tern Islands	Aug. 08, 1907	Mouths of Mississippi River, Louisiana	Unknown
Shell Keys	Aug. 17, 1907	South Louisiana coast	Unknown
Three Arch Rocks	Oct. 14, 1907	West Oregon coast	Unknown
Flattery Rocks	Oct. 23, 1907	West Washington coast	Unknown
Quillayute Needles	do	do	Unknown
Copalis Rock	do	do	Unknown
East Timbalier Island	Dec. 17, 1907	South Louisiana coast	Unknown
Mosquito Inlet	Feb. 24, 1908	East Florida coast	Unknown
Tortogas Keys	Apr. 6, 1908	Florida Keys, Florida	Unknown
Klamath Lake	Aug. 8, 1908	Oregon and California	Unknown
Key West	do	Florida Keys, Florida	Unknown
Lake Malbeur	Aug. 13, 1908	Oregon	Unknown
Chase Lake	Aug. 26, 1903	North Dakota	Unknown
Pine Island	Sept. 13, 1908	West Florida coast	Unknown
Matlacbu Pass	Sept. 26, 1908	do	Unknown
Palma Soda	do	do	Unknown
Island Bay	Oct. 23, 1908	Florida	Unknown
Loch Katrina	Oct. 26, 1908	Wyoming	Unknown
East Park	Feb. 23, 1909	California	Unknown

Cold Springs	do	Oregon	Unknown
Shoshone	do	Wyoming	Unknown
Pathfinder	do	do	Unknown
Bellefourche	do	South Dakota	Unknown
Strawberry Valley	do	Utah	Unknown
Salt River	do	Arizona	Unknown
Deer Flat	do	Idaho	Unknown
Minidoks	do	do	Unknown
Willow Creek	do	do	Unknown
Carlsbad	do	New Mexico	Unknown
Rio Grande	do	do	Unknown
Keechetus Lake	do	Washington	Unknown
Kachess Lake	do	do	Unknown
Cleatum Lake	do	do	Unknown
Bumping Lake	do	do	Unknown
Conconully	do	do	Unknown
Yukon Delta	Feb. 27, 1902	Alaska	Unknown
Bering Sea	do	do	Unknown
Pribilof	do	do	Unknown
Tuxedul	do	do	Unknown
St. Lazarin	do	do	Unknown
Farallon	do	California	Unknown
Culebra	do	Porto Rico	Unknown
Hawaiian Islands	Feb. 3, 1909	Hawaii	Unknown
Bugoalot	Mar. 2, 1909	Alaska	Unknown

APPENDIX 12

1913 Annual Report of the Commissioner of Indian Affairs (For the Fiscal Year Ended June 30, 1913)

(Itemizing the Ninety-Nine Indian Reservations Set Apart by Executive Order)

---

* * *

[p. 70]

TABLE 7 – *General data for each Indian reservation, under what agency or school, tribes occupying or belonging to it, area not allotted or specially reserved, and authority for its establishment, to Nov. 3, 1913.*

* * *

[p. 72]

Coeur d'Alene	Executive orders, June 14, 1867, and Nov. 8, 1873; agreements made Mar. 26, 1887, and Sept. 9, 1889, and confirmed in Indian appropriation act approved Mar. 3, 1891, vol. 26 pp. 1026, 1029. Agreement, Feb. 7, 1894, ratified by act of Aug. 15, 1894, vol. 28, p. 322. 638 Indians have been allotted 104,077 acres and 1,906.99 acres have been reserved for agency, school, and church purposes and for mill sites. (See 86950-1908, and acts of June 21, 1906 (34 Stat. L., 325-355), Mar. 3, 1891 (26 Stat. L., 1026-1029), Aug. 15, 1894 (28 Stat. L., 322), Mar. 27, 1908 (35 Stat. L., 56), Apr. 30, 1909 (35 Stat. L., 78.) President's proclamation issued May 22, 1909, opening 224,210 acres surplus lands to settlement. (37 L.D., 698)
